

MISSISSIPPI LAW JOURNAL



ARTICLE

**CONSTRUCTION CONTRACT CLAIMS AND
LITIGATION—SUITS ON PUBLIC BONDS
AND SUITS ON PRIVATE BONDS**

Vardaman S. Dunn

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**INSURANCE BAD FAITH IN MISSISSIPPI
THE ARGUABLE REASON, PUNITIVE DAMAGES AND
TRIAL PROCEDURE**

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**CONSTRUCTION CONTRACT CLAIMS
AND LITIGATION—SUITS ON PUBLIC
BONDS AND SUITS ON PRIVATE
BONDS**



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*Vardaman S. Dunn**

I. INTRODUCTION

This article deals with a subject that is not generally understood and one that frequently is misunderstood. It is designed to provide general practitioners with a working knowledge of the subject of construction bond claims and litigation when faced with the problems of preparing for and asserting or defending claims by those who supply labor, material or other items for use under contracts on both public and private construction projects in Mississippi.¹

The discussion to follow will focus upon those problems growing out of construction contracts and contract bonds which are most likely to be confronted by the lawyer who will represent contractors, materialmen, and, to a degree, upon the problems of those who will represent bonding companies and banks.

The legal problems begin with the tragedy of a contractor's default. Default can come from the contractor's failure to complete the work project or from his failure to pay all claims incurred by him for labor, materials, or other construction items, or from both.

Contracts within the scope of this discussion are of four kinds and may be grouped as (1) federal contracts; (2) nonfederal public contracts in general; (3) state highway contracts; and (4) private contracts. These are similar in some respects but quite different in others.

II. FEDERAL CONTRACTS

The vast majority of federal works bonds are governed by

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¹ See generally Yarbrough, *Rights and Remedies Under Mississippi's New Public Construction Bond Statute*, 51 Miss. L.J. 351 (1980-81)(discussing differences and similarities between the Federal Miller Act and Mississippi's public construction bond statutes).

the so-called Miller Act,² which applies to any contract for the construction, alteration or repair of any public building or public work of the United States which exceeds \$25,000.00. This Act applies only when the contracts are made by or for the United States and the United States is the named obligee in the bond.³ The Act does not apply otherwise, even when the United States supplies the construction funds and retains some measure of control over the performance.⁴ For example, when a state lets a contract for the construction of a federal aid interstate highway project, the bond for the underlying contract, which names the state as obligee, is not a Miller Act bond, although the United States contributes ninety percent of the cost, sets the standards for the construction, and reserves the right to approve the required performance or any changes therein.⁵ This is so because the United States simply has not elected to assume the obligations of contractee for the project in relation to the prime contractor and his suppliers.⁶ Also, federal agencies may be authorized to formulate their own construction contract and bond forms and requirements, as, for example, in the administration of the Capehart Housing Act by the Department of Defense. When this occurs, the Miller Act does not write itself into the resulting contract documents under which the work is let and different conditions may control the rights of the parties involved.⁷

² Ch. 642, 49 Stat. 793 (1935)(codified as amended at 40 U.S.C. §§ 270a-270d (1982)).

³ See *United States ex rel. Miller v. Mattingly Bridge Co.*, 344 F. Supp. 459, 461 (W.D. Ky. 1972)(Miller Act does not apply where work in question was not contracted for by United States or by agency of United States or person acting directly as agent of United States).

⁴ See *United States ex rel. Mississippi Rd. Supply Co. v. H.R. Morgan, Inc.*, 542 F.2d 262, 266 (5th Cir. 1976)(Miller Act does not apply unless subcontractor can assert action for equitable recovery against United States or one of its agencies).

⁵ See *United States ex rel. Miller v. Mattingly Bridge Co.*, 344 F. Supp. 459, 461 (W.D. Ky. 1972).

⁶ *Id.*

⁷ See *Continental Casualty Co. v. United States ex rel. Robertson Lumber Co.*, 305 F.2d 794, 800 (8th Cir. 1962). In this case, a "Capehart" bond required a "dual notice" by a supplier of a subcontractor as a condition precedent to suit on the contractor's payment bond. *Id.* at 796. This condition was enforced, although the Miller Act has no such requirement. *Id.* at 799.

The Miller Act replaced the Heard Act⁸ in 1935. The purpose of the Miller Act was to eliminate certain procedural limitations and not to restrict in any way the coverage of the Heard Act.⁹ The federal act was again amended in 1966 to include coverage for taxes withheld from wages of the contractor's employees.

The Miller Act provides for the filing of bonds by the contractor to guarantee performance of the work to the United States and to guarantee the payment of sums justly due to third parties who have furnished labor or material in the prosecution of the work. Two separate bonds are used. One is called a "performance bond" and the other a "payment bond." Each has its special function.

The discussion here applies to the payment bond, since this bond affects suppliers of labor and material for the project and is involved in most of the ordinary litigation arising out of public contracts. The Miller Act payment bond is designed to benefit every person who has furnished "labor or material in the prosecution of the work . . . who has not been paid in full . . . sums justly due him."¹⁰ While this language appears to be clear and plain, it raises several questions. For example: (1) What is "labor or material"?; (2) When is this furnished "in the prosecution of the work"?; (3) What is the significance of the provision for payment "in full" of "sums justly due"?; (4) Who is a "person"?; and (5) How far removed in the chain of supply from the prime contractor can a person be and still enjoy protection under the bond?

A. *Construction of Federal Bonds*

In resolving Miller Act questions of bond coverage and liability to the intended class of beneficiaries, the Act is to be liberally construed. It is said that the Act is highly remedial and entitled to liberal construction and application in order properly to

⁸ Ch. 280, 28 Stat. 278 (1894)(codified as amended at 40 U.S.C. § 270 (1934)), repealed by Miller Act, Ch. 642, 49 Stat. 793 (1935).

⁹ See *MacEvoy v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 105 (1944).

¹⁰ 40 U.S.C. § 270b(a).

effectuate the congressional intent to protect suppliers of labor and materials for public projects.¹¹ The same rule applies to the notice provisions of the Act.¹²

B. Labor and Materials Under Federal Bond

The Miller Act uses the terms "labor or material." Most items can be readily identified as labor or materials, but the scope and reach of this provision has been the subject of much litigation. What, for example, is the status of rented equipment, purchased equipment, equipment repairs, and items supplied for but diverted from use in the bonded project?

1. Rented Equipment Under Federal Bond

Equipment is a major item used in many construction contracts. Is the use of construction equipment "labor or material" within the coverage of the Miller Act? Despite the generally prevailing rule which excludes equipment from the concept of labor or material, claims of persons supplying the Miller Act contractor with needed equipment under lease or rental contracts have consistently been allowed in actions on the payment bond.¹³ This view of bond coverage for leased or rented equipment raises the question of the extent to which lease contract obligations may be considered as reasonable rental. The first consideration on this point is that the rental terms be reasonable as tested by industry standards. Presumably, negotiated terms are reasonable where the parties deal at arms length; however, when challenged, the reasonableness of rental terms can become a fac-

¹¹ See *MacEvoy v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944); *United States ex rel. Clark Fontana Paint Co. v. Glassman Constr. Co.*, 397 F.2d 8, 10 (4th Cir. 1968).

¹² See *United States ex rel. Kelly-Mahrhusen Co. v. Merle A. Patnode Co.*, 457 F.2d 116, 118 (7th Cir. 1972)(provisions in Miller Act relating to giving written notice are to be liberally and not literally construed).

¹³ See *Illinois Sur. Co. v. John Davis Co.*, 244 U.S. 376, 383 (1916)(rental for cars, track and equipment used for loading was properly recoverable under payment bond); *United States ex rel. Llewellyn Mach. Corp. v. National Sur. Corp.*, 268 F.2d 610, 611 (5th Cir.)(rental payments contracted for by general contractors are recoverable under terms of Miller Act), *cert. denied*, 361 U.S. 914 (1959); *Massachusetts Bonding & Ins. Co. v. United States ex rel. Clarksdale Mach. Co.*, 88 F.2d 388, 390 (5th Cir. 1937)(rental of fifteen trucks was recoverable under bond).

tual issue.

In addition to a reasonable rental rate, a lease contract may provide that the contractor shall assume collateral obligations as a part of the rental or consideration for the lease. In general, reasonable collateral obligations assumed by the contractor-lessee as a part of the consideration for the lease are considered to be a part of the rental and are recoverable by the lessor as such. For example, claims for freight, dismantling, and assembly costs have been allowed when provided for in the lease contract.¹⁴ The ultimate in liberality in this area was attained in a case which allowed recovery for a machine lost at sea where the lease contract obligated the lessee to make good any damage to or loss of the equipment.¹⁵

2. Purchased Equipment Under Federal Bond

Under the Miller Act, there can be no recovery for the unpaid acquisition price of purchased construction equipment or for the use value of purchased equipment while employed on the construction project. The same rules apply to repairs to the contractor's purchased equipment which add materially to its value and amount to capital improvements, as distinguished from incidental replacement or operating repairs.¹⁶ It is only where the purchased equipment items are incorporated in the work or where the seller and contractor "reasonably expected" equipment items to have been "substantially used up in the work

¹⁴ See *Illinois Sur. Co. v. John Davis Co.*, 244 U.S. 376, 383 (1916)(expense of loading and freight was properly included with fixed rental as recoverable under bond); *United States ex rel. Benkart Co. v. John A. Johnson & Sons, Inc.*, 236 F.2d 864, 865 (3d Cir. 1956)(expenses of dismantling, transporting and mounting steam shovel are recoverable under payment bond).

¹⁵ See *United States ex rel. Llewellyn Mach. Corp. v. National Sur. Corp.*, 268 F.2d 610, 611 (5th Cir. 1959).

¹⁶ See *Continental Casualty Co. v. Clarence L. Boyd Co.*, 140 F.2d 115, 116-17 (10th Cir. 1944)(repair parts, appliances and accessories which added materially to value of equipment and rendered it available for other work were not within coverage of payment bond); *Massachusetts Bonding & Ins. Co. v. United States ex rel. Clarksdale Mach. Co.*, 88 F.2d 388, 389-90 (5th Cir. 1937)(costs of parts furnished to repair rented trucks were considered repair and maintenance costs not recoverable under the Miller Act); *United States v. Hercules Co.*, 52 F.2d 454, 455 (5th Cir. 1931)(claimant did not recover cost of repairs under bond because he failed to prove repairs were not part of contractor's capital investment).

under contract" that the equipment becomes "labor or materials" within the scope of the Miller Act bond.¹⁷

However, it is not always an easy task to determine whether equipment is purchased or only rented. This problem usually arises when an equipment seller attempts to secure bond protection to the extent of the use value of the equipment in the event of a default in payment of the purchase price. The result is a hybrid kind of contract that is sometimes referred to as a "rental-purchase" agreement, which may consist of one or two documents. These arrangements may or may not be classed as a lease or rental contract. Depending upon the terms, the arrangement—regardless of what the parties choose to call it—may be either a rental contract or a purchase and sale contract. Some are clearly one, and some are clearly the other, and still others fall in between and are difficult to classify.

To illustrate, a contract to rent a machine for a fixed number of months with an unconditional obligation to pay the rental, without right of cancellation, coupled with the option given to the contractor to acquire ownership at the end of the term for a nominal sum, amounts to a sale and not a true lease at all.¹⁸ On the other hand, a true lease is not to be considered a sale merely because the contractor is given an option to purchase and apply rental payments or some portion thereof on the agreed purchase price.¹⁹ However, if the nominal "rental" payments appear to represent both rent and consideration for the option to purchase, as when the payments are substantially in excess of rental rates generally prevailing in the industry, recovery on the bond may be allowed but the amount will be lim-

¹⁷ See *Boyd Callan, Inc. v. United States ex rel. Steves Indus., Inc.*, 328 F.2d 505, 510 (5th Cir. 1964). It should be noted that the test announced depends on consumption "reasonably expected" as distinguished from actual consumption of the item on the project. *Id.*

¹⁸ See *Motor Power Equip. Co. v. Park Transp. Co.*, 247 N.W. 244, 245 (Minn. 1933).

¹⁹ Compare *Roane v. United States Fidelity & Guar. Co.*, 378 F.2d 40, 43-44 (10th Cir. 1967)(option-to-purchase agreement did not prevent claimant from recovering full amount of rental under bond) with *United Pac. Ins. Co. v. United States ex rel. Mississippi Valley Equip. Co.*, 296 F.2d 160, 164 (8th Cir. 1961)(surety on payment bond was liable only for actual rental of equipment and not portion of payment which applied toward purchase under option-to-purchase agreement).

ited to the portion of the payments representing actual rentals payable under the contract of the parties.²⁰

3. Effect of a Diversion of Material Supplied For a Construction Project

The Miller Act is unique in providing bond coverage for materials purchased for, but not actually used in, the performance of the contract work for which the Miller Act bond is given. Bond coverage, by the terms of the Act, applies in favor of every person who has furnished material "in the prosecution of the work." The Act does not say that the material must be used in the prosecution of the work. Applying this phrase under the liberality mandate, it is held to be sufficient that the supplier has sold the material to the contractor for use in the project, and diversion of the material by the contractor is not a valid defense to a claim for the price if the supplier acted in good faith.²¹

Once the supplier proves that he supplied the material for the prosecution of the work, he is entitled to a judgment on the bond unless the bonding company comes forward with proof that the supplier knew or should have known that the material was to be used elsewhere and hence that the claim is made in bad faith. Moreover, while delivery to the job site is presumptive evidence that the material was used in the work, proof of delivery is not a prerequisite to recovery on the Miller Act bond.²²

²⁰ See *United Pac. Ins. Co. v. United States ex. rel. Mississippi Valley Equip. Co.*, 296 F.2d 160, 164 (8th Cir. 1961).

²¹ See *United States ex rel. Carlson v. Continental Casualty Co.*, 414 F.2d 431, 433 (5th Cir. 1969); *Roscoe-Ajax Constr. Co. v. United States ex rel. Taylor Prod. Corp.*, 351 F.2d 305, 305 (9th Cir. 1965); *Fourt v. United States ex rel. Westinghouse Elec. Supply Co.*, 235 F.2d 433, 435 (10th Cir. 1956); *Commercial Standard Ins. Co. v. United States ex rel. Crane Co.*, 213 F.2d 106, 108-09 (10th Cir. 1954); *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527, 529 (5th Cir. 1946).

²² See *United States ex rel. Carlson v. Continental Casualty Co.*, 414 F.2d 431, 433-34 (5th Cir. 1969) (materialman who supplied materials in good faith was entitled to recover under payment bond although he did not prove materials were actually used on job).

C. Subcontractors on Federal Projects—Direct and Remote—The Sub-subcontractor

A subcontractor is one who performs for or takes from the prime contractor a specific part of the labor or material requirements of the original contract. This definition is used to distinguish the status of a subcontractor from ordinary laborers and materialmen where a distinction becomes necessary. In a broader sense, however, a subcontractor is anyone who has a contract to furnish labor or material to the prime contractor.²³ In this broad sense, a subcontractor is a person who has furnished labor or material and is a beneficiary of the Miller Act bond.

But the subcontractor who seeks recovery on the bond must not be too remote in relation to the prime contractor. A sub-subcontractor, like an ordinary materialman of a subcontractor, may avail himself of the protection of the bond by giving the statutory notice, but those in more remote relationships may not. A sub-sub-subcontractor is too remote in the chain of supply and his claims for labor and materials may not be successfully asserted against the Miller Act bond.²⁴

D. Material Suppliers on Federal Projects—Direct and Remote—The Materialman of a Materialman

May a supplier of material to a materialman from whom the contractor, in turn, acquires the material maintain an action on the contractor's Miller Act bond? Despite the broad language of the Act and earlier indications to the contrary, the Supreme Court has held that the bond does not extend coverage to materialmen who supply material to another materialman. The reason given relates to the practical difficulty that would be encountered by the prime contractor in protecting himself against claims of remote material suppliers with whom he has no con-

²³ See *Clifford E. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102, 108 (1944).

²⁴ See *Elmer v. United States Fidelity & Guar. Co.*, 275 F.2d 89, 90 (5th Cir. 1960) (where prime contractor subcontracted asphalt paving work to subcontractor who sublet work to another firm which hired plaintiff, plaintiff was sub-sub-subcontractor who could not recover under Miller Act).

tractual relationship. The presumption is that Congress did not intend to impose such a burden without explicit language being used to this effect.²⁵

The next question is whether materialmen who supply a remote or second-tier subcontractor are protected by the prime contractor's Miller Act bond. The Supreme Court recently supplied an explicit negative answer to this question.²⁶ The now-established rule is that those who supply labor or material to a first-tier subcontractor may be protected by the bond, but the bond protection does not extend beyond that point. Those who supply sub-subcontractors may not recover on the prime contractor's Miller Act bond,²⁷ the reason being that the relationship to the prime contractor is too remote and Miller Act bond coverage is beyond the ascertained intent of Congress.²⁸

Since one who supplies material to a subcontractor of the prime contractor and who gives the statutory notice is entitled to the protection of the bond, but one who supplies material to a materialman of the prime contractor is not protected, questions inevitably arise in close cases as to the true status of a person to whom the material is supplied. Is he, in a given case, a subcon-

²⁵ See *Clifford E. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102, 110 (1944).

²⁶ *J.W. Bateson Co. v. United States ex rel. Board of Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586, 594 (1978).

²⁷ See *id.* at 590-94.

²⁸ See *id.* at 594. An exception could possibly exist on proof of a sham or fraud as when one alleged subcontractor can be seen as no more than a mere alter ego of the other subcontractor and the entire arrangement is only a device to evade responsibility under the Miller Act. See, e.g., *Glen Falls Ins. Co. v. Newton Lumber & Mfg. Co.*, 388 F.2d 66, 70 (10th Cir. 1967) (where first-tier subcontractor was close friend and relative of prime contractor, court held that contract was sham and that plaintiff was true subcontractor), *cert. denied*, 390 U.S. 905 (1968); *Continental Casualty Co. v. United States ex rel. Conroe Creosoting Co.*, 308 F.2d 846, 851 (5th Cir. 1963) (where prime contractor set up subsidiary as first-tier subcontractor for purpose of avoiding liability under Miller Act, court treated parent and subsidiary as one corporation). But the mere fact that one alleged subcontractor in the chain of contracts actually performs no work on the project with its own forces does not, standing alone, establish a basis for an exception to the rule, since the courts view the formal contract structure as controlling, at least in the absence of actual fraud. See *United States ex rel. K & M Corp. v. A & M Gregos, Inc.*, 607 F.2d 44, 48 (3d Cir. 1979) (since evidence did not show an actual sham or attempt to circumvent liability under Miller Act, court held that plaintiff who contracted with second-tier contractor could not recover under Miller Act).

tractor or only a materialman?

In this sense, a subcontractor is defined as one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding the ordinary laborers and materialmen.²⁹ This has been referred to by the Supreme Court as "a functional rather than a technical definition."³⁰ What the parties choose to call the arrangement is not necessarily controlling on this question.³¹ Finally, the Court has observed that the test intended to be established was "the substantiality and importance" of the relationship test.³² This derives from the fact that a prime contractor can usually protect himself by requiring security or other protections from those few "subcontractors" with whom he has a substantial relationship in the performance of the contract.³³ Needless to say, this statement of the rule tends to beg the question, and, in any event the test is not an easy one to apply, since the words are relative ones and the result turns upon a point of degree. Therefore, the question will continue to produce litigation.

Many cases deal with this subject and space limitations prevent an exhaustive review of them. However, some courts have limited their findings of a subcontract relationship to on-site performers under contract with the prime contractor. Others consider on-site performance as unnecessary to the establishment of the subcontract relationship, especially where customized items are supplied to specifications peculiar to the particular project involved.³⁴ For example, one who supplies stock

²⁹ *Clifford E. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102, 109 (1944).

³⁰ *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 123 (1974).

³¹ See *United States ex rel. Bryant v. Lembke Constr. Co.*, 370 F.2d 293, 295-96 (10th Cir. 1966).

³² See *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 123 (1974) (stating that test for subcontractor is based on substantiality and importance of subcontractor's relationship with prime contractor).

³³ *Id.* at 123-24.

³⁴ See *United States ex rel. Wellman Eng'g Co. v. MSI Corp.*, 350 F.2d 285, 287 (2d Cir. 1965) (mechanism built to prime contract specifications for unique task of moving concrete roofs of missile launchers qualified party as subcontractor even though no on-site work was performed).

material, such as concrete,³⁵ sand, or gravel,³⁶ is generally found to be an ordinary materialman, whereas the furnishing of items specially designed for the particular project and not readily useable elsewhere is usually found to create for the supplier the status of a subcontractor, thereby admitting claims of those who supply materials which become a part of the items furnished.³⁷

E. Actions on the Miller Act Payment Bond

No suit may be commenced after the lapse of one year after the day on which the last of the labor was performed or the last of the material was supplied.³⁸ The running of the time has nothing to do with the completion or acceptance of the project by the owner, as was the case under the Heard Act, and as is the case under many state statutes. The time begins running when the last item is performed or supplied.

It is not always easy, however, to determine when the "last" item is supplied. For example, where material is supplied under a series of separate contracts, each contract may be found to stand alone for limitation purposes. Also, the last item relied upon to save the claim from the statute must be something other than material or labor used to correct a defect after completion of the work.³⁹

The bar of the statute is not easily waived, but it has been recognized that a bonding company may by its conduct be equitably estopped from pleading the statute as a defense, as where the bonding company has promised payment and the supplier

³⁵ See *United States ex rel. Bryant v. Lembke Constr. Co.*, 370 F.2d 293, 295-96 (10th Cir. 1966).

³⁶ See *Brown & Root, Inc. v. Gifford-Hill & Co.*, 319 F.2d 65, 66 (5th Cir. 1963).

³⁷ See *United States ex rel. Wellman Eng'g Co. v. MSI Corp.*, 350 F.2d 285, 287 (2d Cir. 1965)(appellee who furnished hydraulic system according to contract held to be a subcontractor).

³⁸ 40 U.S.C. § 270b(b)(1982).

³⁹ See *United States ex rel. General Cable Corp. v. Power Eng'g Co.*, 421 F.2d 1355, 1357 (5th Cir. 1970)(since cable deliveries were made under single contract and not under series of separate contracts, no part of claim was barred by one-year statute of limitations period); *General Ins. Co. v. United States ex rel. Audley Moore and Son*, 409 F.2d 1326, 1327 (5th Cir.1969)(supplying labor or furnishing material to correct defects after completion of work did not extend time for filing suit under Miller Act), *cert. denied*, 396 U.S. 902 (1969).

has relied upon the promise in delaying action on the bond.⁴⁰

F. The Ninety-Day Notice Requirement Under the Miller Act

Persons supplying a subcontractor of the prime contractor are protected by the Miller Act bond only if the statutory notice is given.⁴¹ The giving of a written notice is a condition precedent to the right to sue, and this provision of the Act must be given effect.⁴² The notice must be given within ninety days from the date on which the supplier performed the last of the labor or furnished the last of the material for which claim is made.⁴³ The provision is for the benefit of the prime contractor so as to enable him to protect himself by withholding money otherwise due his subcontractor.⁴⁴ But that purpose is to be considered along with the Act's prime purpose of protecting those who supply labor and material. Technical rules are to avoided to ensure that the statute is liberally construed.⁴⁵

It is not always easy to determine when the last labor or material for which claim is made is actually furnished and consequently when the ninety-day limitation period begins to run. The rule is that when material is supplied as part of the original contract and is necessary to fulfill the original job specifications, the delivery qualifies as material supplied "for which claim is made" and may mark the beginning of the ninety-day notice period. However, when the material is furnished for repairs or to cure a defect in the material previously installed, such an item is not part of the original contract and is not to be counted to ex-

⁴⁰ See *United States ex rel. Humble Oil & Refining Co. v. Fidelity & Casualty Co.*, 402 F.2d 893, 897-900 (4th Cir. 1968).

⁴¹ 40 U.S.C. § 270b(a)(1982).

⁴² See *Fleisher Eng'g & Constr. Co. v. United States ex rel. Hallenbeck*, 311 U.S. 15, 18 (1940).

⁴³ 40 U.S.C. § 270b(a)(1982).

⁴⁴ See *United States ex rel. General Elec. Co. v. H.I. Lewis Constr. Co.*, 375 F.2d 194, 201 (2d Cir. 1967)(notice provision of Miller Act protects prime contractor by fixing date beyond which he is not liable for subcontractor's debts); *Noland Co. v. Allied Contractors, Inc.*, 273 F.2d 917, 920 (4th Cir. 1960)(same); *United States ex rel. Noland Co. v. Andrews*, 406 F.2d 790 (4th Cir. 1968).

⁴⁵ See *Noland Co. v. Allied Contractors, Inc.*, 273 F.2d 917, 921 (4th Cir. 1960).

tend the period of time allowed for giving notice.⁴⁶ Because the line to be drawn is often hazy,⁴⁷ each case must be judged on its own facts. Sweeping rules about "repairs" offer little help.⁴⁸ The factors to be considered in any analysis of the facts on this score include (1) the value of the material; (2) the original contract specifications; (3) the unexpected nature of the work; and (4) the importance of the material to the operation of the system in which it is used.⁴⁹

A special problem is presented when a series of purchase contracts relating to a single construction project is involved. In such cases, each separate purchase and delivery stands on its own and a claim is barred on each purchase unless the notice is given within ninety days of the date the last item was supplied under the particular purchase contract or order. The fact that all items are used upon the same bonded project does not serve to postpone the starting date until the last item in the series is supplied, but if there is one contract and a series of deliveries under the single contract, the time for notice begins only upon the last delivery in the series.⁵⁰ The notice must be given after, and not before, the supplier furnishes the last of the labor or the last of the material for which claim is made. Notice given prior

⁴⁶ See *General Ins. Co. v. United States ex. rel. Audley Moore & Son*, 409 F.2d 1326, 1327 (5th Cir. 1969)(furnishing labor or materials for correction of defects in work done does not extend time), *cert. denied*, 396 U.S. 902 (1969); *United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568, 572-73 (9th Cir. 1964)(test for whether period of limitations begins is whether materials supplied are part of contract or for correction of defects).

⁴⁷ See *United States ex rel. Georgia Elec. Supply Co. v. United States Fidelity & Guar. Co.*, 656 F.2d 993, 996 (5th Cir. 1981)("repairs" test is admittedly hazy).

⁴⁸ See *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 173 (5th Cir. 1973)(facts of each case are determinative; broad "repair" theories hardly further analysis).

⁴⁹ See *United States ex rel. Georgia Elec. Supply Co. v. United States Fidelity & Guar. Co.*, 656 F.2d 993, 996 (5th Cir. 1981)(factors enumerated).

⁵⁰ See *United States ex rel. General Elec. Co. v. H.I. Lewis Constr. Co.*, 375 F.2d 194, 201 (2d Cir. 1967)(supplier's claim barred where notice was not given within required 90 days for goods purchased on separate order); *United States ex rel. J.A. Edwards & Co. v. Peter Reiss Constr. Co.*, 273 F.2d 880, 881-82 (2d Cir. 1959)(materialman's notice deemed to have been given too late pursuant to a series of orders as opposed to a single contract); *cf. United States ex rel. General Cable Corp. v. Power Eng'g Co.*, 421 F.2d 1355, 1356 (5th Cir. 1970)(claim was not barred where deliveries were made on a single contract).

to this event is premature and is not effective as a statutory notice.⁵¹

Much more could be written on the subject of when the last item is supplied in the prosecution of the work, and the annotations to the Code section should be consulted for rules in specific cases. The safe procedure is to give the notice when in any doubt at all, because there is no limit imposed upon the number of notices which may be given. A word of caution, however, is indicated. The one-year limitation period for filing suit also runs from the time that the last item is performed or supplied and not from the date the notice is given.⁵²

The notice need not be in any set form, but in substance it must inform the contractor, expressly or by implication, that the supplier is looking to the contractor for payment⁵³ and with "substantial accuracy" must recite (1) the amount claimed; (2) the name of the party receiving the supplies; and (3) the identity of the project for which the supplies were furnished.⁵⁴ The mere delivery of monthly statements showing the materials delivered to the job, the amount due from the subcontractor, the amounts paid and the balance due is not enough to comply with the statute.⁵⁵

The statute requiring the notice is carefully and meticulously phrased, but its objective is to assure that the contractor will have timely notice. The format and method of communication is secondary and may even be disregarded when actual notice has been received by the contractor. Thus, even an oral notice may suffice if it is acknowledged in writing and when it is proven and it plainly appears that the claim and the nature and state of the debt was brought home to the general contractor within the time allowed by the statute.⁵⁶ For like reason, the

⁵¹ See *United States ex rel. Kinlaw Sheet Metal Works, Inc. v. Great Am. Ins. Co.*, 537 F.2d 222, 223-24 (5th Cir. 1976); *National Union Indem. Co. v. R.O. Davis, Inc.*, 393 F.2d 897, 900 (5th Cir. 1968).

⁵² 40 U.S.C. § 270b(b)(1982).

⁵³ See *Bowden v. United States ex rel. Malloy*, 239 F.2d 572, 577 (9th Cir. 1956), *cert. denied*, 353 U.S. 957 (1957).

⁵⁴ See *United States ex rel. Kinlaw Sheet Metal Works, Inc. v. Great Am. Ins. Co.*, 537 F.2d 222, 223 (5th Cir. 1976).

⁵⁵ *Id.* at 224.

⁵⁶ *Id.* *Houston Fire & Casualty Ins. Co. v. United States ex rel. Trane Co.*, 217 F.2d

failure to observe the requirement that a "written notice" be given by "registered mail" will not be fatal to the claim if notice was otherwise actually received.⁵⁷

G. Attorney's Fees in Miller Act Cases

The Miller Act provides for the payment of covered items in terms of requiring that the supplier of labor or material be "paid in full" for the sums "justly due." Does this language authorize the shifting of attorney's fees from the successful claimant to the defendant against whom a judgment is rendered on the bond? The Supreme Court faced this question in 1974 and held that the shifting was not authorized in Miller Act litigation, unless attorney's fees were imposed by federal statute or by an enforceable contract.⁵⁸ The Court also held that the Miller Act provides a federal cause of action and that the scope of the remedy as well as the substance of the rights created thereby is a matter of federal, not state law.⁵⁹ On this premise, the allowance by a state statute of attorney's fees to a successful plaintiff in an action on bonds applicable to state projects was held to be ineffective in Miller Act litigation.⁶⁰

But the exception to the allowance of attorney's fees to a successful claimant which is related to contract provisions opens a fascinating field in which careful advance planning has produced very satisfying results from the supplier's viewpoint. For example, an equipment lease agreement may provide that in the event of default the lessee becomes liable for attorney's fees incurred in enforcing the obligations of the contract.⁶¹ Contracts

727, 730 (5th Cir. 1954)(notice considered sufficient where prime contractor received actual notice even though there was no technical compliance).

⁵⁷ See *Fleisher Eng'g & Constr. Co. v. United States ex rel. Hallenbeck*, 311 U.S. 15, 19 (1940).

⁵⁸ See *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 126 (1974).

⁵⁹ *Id.* at 127. The Court stated that federal courts should not be faced with the task of considering individual "state policy" in federal construction contract actions and that a uniform rule of nationwide applicability should be employed. *Id.* at 127-28.

⁶⁰ *Id.* at 128.

⁶¹ See *United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc.*, 554 F.2d 164, 165-66 (5th Cir. 1977)(involving equipment lease).

to supply materials may contain a similar provision.⁶² Even a provision for attorney's fees included on invoices for materials may be honored.⁶³ A labor contract may contain such a provision.⁶⁴ In these situations, the provision for attorney's fees becomes a part of the consideration for the labor or materials and fees are recoverable as a part of the price of the items supplied.⁶⁵

H. Jurisdiction and Venue in Miller Act Litigation

Every suit on a Miller Act bond must be brought in the name of the United States for the use of the person suing. It must be brought in the United States District Court in a district in which the contract was to be performed and executed in whole or in part. The action may not be brought elsewhere as no other court has jurisdiction. No jurisdictional amount is required as in ordinary cases. Consent need not be obtained from the United States for the use of its name, but the United States is not liable for the payment of any costs or expenses of the suit.⁶⁶ Since the state courts are devoid of subject matter jurisdiction, the filing of an action in the state court on a Miller Act claim is a nullity and is without effect, even when the action proceeds to a judgment in that court, and will not even serve to toll the Miller Act time limitations for filing suit on the bond in the proper court.⁶⁷

I. Time Limitations—Waiver

The limitation of ninety days for giving notice is worded differently from the one-year limitation for filing an action on

⁶² See *Travelers Indem. Co. v. United States ex rel. Western Steel Co.*, 362 F.2d 896, 899 (9th Cir. 1966); *Continental Casualty Co. v. United States ex rel. Conroe Creosoting Co.*, 308 F.2d 846, 849 (5th Cir. 1962).

⁶³ See *D & L Constr. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009, 1012 (8th Cir. 1964) (provision for attorney's fees on invoices upheld).

⁶⁴ See *Gergora v. R.L. Lapp Forming, Inc.*, 619 F.2d 387, 391 (5th Cir. 1980) (involving labor contract); *United States ex rel. Sherman v. Carter*, 353 U.S. 210 (1967) (involving collective bargaining agreement).

⁶⁵ See *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 220 (1967).

⁶⁶ 40 U.S.C. § 270b(b) (1982).

⁶⁷ See *United States ex rel. Harvey Gulf Int'l Marine, Inc. v. Maryland Casualty Co.*, 573 F.2d 245, 247 (5th Cir. 1978) (jurisdiction of Miller Act claims is exclusively federal; timely filing in state court does not toll running of Miller Act limitations period).

the bond. However, since the Act created a new right and prescribed the remedy, observance of both of these limitations is mandatory and jurisdictional in nature and a condition precedent to the exercise of the right of action so conferred.

Time, therefore, is of the essence in regard to recovery on a Miller Act bond.⁶⁸ The statutory time bar may be the subject of a plea in avoidance under the doctrine of equitable estoppel.⁶⁹ Thus, it has been held that a Miller Act surety may be estopped by its statements or conduct when the claimant is misled thereby to his prejudice into a reasonably justifiable belief that the surety is not invoking and will not invoke the time bar.⁷⁰ While actual fraud may be the basis for an estoppel, it is not necessary to show fraud to invoke the doctrine of estoppel in this respect.⁷¹ On the other hand, the bar of the statute is not easily waived and estoppel is available only upon clear proof of misleading conduct. The fact that negotiations were in progress when the time expired is, without more, an insufficient foundation on which to erect an estoppel.⁷²

⁶⁸ See *Celanese Coatings Co. v. McNair*, 504 F.2d 466, 468 (9th Cir. 1974)(plaintiff's recovery on Miller Act claim is predicated upon observation of time limitations); *Statham Instruments v. Western Casualty & Sur. Co.*, 359 F.2d 521, 523 (6th Cir. 1966)(right to maintain Miller Act suit is conditioned on timeliness); *Dover Elevator Co. v. General Ins. Co.*, 339 F.2d 194, 195 (6th Cir. 1964)(right to invoke Miller Act protection conditioned upon timely suit); *United States ex rel Soda v. Montgomery*, 253 F.2d 509, 512 (3d Cir. 1958)(observation of time limitations are condition precedent to Miller Act suit).

⁶⁹ See *General Ins. Co. v. Audley Moore & Son*, 406 F.2d 442, 444 (5th Cir. 1969)(plaintiff claimed defendant should be estopped from asserting time-limitations defense because of plaintiff's reliance on statements of defendant's attorney); *United States ex rel. Humble Oil & Ref. v. Fidelity & Casualty Co.*, 402 F.2d 893, 898 (4th Cir. 1960)(defendant estopped from asserting time-limitations defense where plaintiff relied on defendant's representations); *Bagnal Builders Supply Co. v. United States Fidelity & Guar. Co.*, 411 F. Supp. 1333, 1337 (D.S.C. 1976)(plaintiff allowed to invoke equitable estoppel based upon defendant's representations); cf. *Moretz v. Merle A. Patrode Co.*, 323 F. Supp. 166, 167 (E.D. Wis. 1971)(limitation period was not waived where restraining order enjoined commencement of action until after period had run).

⁷⁰ See *Humble Oil & Ref. Co. v. Fidelity & Casualty Co.*, 402 F.2d 893, 898 (4th Cir. 1960); *Bagnal Builders Supply Co. v. United States Fidelity & Guar. Co.*, 411 F. Supp. 1333, 1337 (D.S.C. 1976).

⁷¹ See *Bagnal Builders Supply Co. v. United States Fidelity & Guar. Co.*, 411 F. Supp. 1333, 1337 (D.S.C. 1976)(only necessary to show that estopped party's representation misled the other to his detriment).

⁷² See *Sam Finley, Inc. v. Pilcher, Livingston & Wallace, Inc.*, 314 F. Supp. 654, 655 (S.D. Ga. 1970)(mere existence of negotiations at time of expiration of limitations period

The one-year limitation for commencing suit begins "after the day on which the last of the labor was performed or material was supplied," and the item furnished need not be one "for which claim is made," as in the case of the time for notice.⁷³ Therefore, a suit filed within one year from the day on which the last item was performed or supplied is timely, although the last such item is not one included in the unpaid claim or one at issue in the suit.⁷⁴

III. STATE PUBLIC CONTRACTS

Possibly even more important to the practitioner is a knowledge of the workings of state statutes governing claims on payment bonds given on public construction for the state and its political subdivisions. The reason is that the greater volume of legal work in a particular state is likely to center around public contracts on the state level. The body of law which has developed in this field is quite extensive and in many respects varies widely from that pertinent to federal Miller Act problems and litigation. Since this article begins with a discussion of the Miller Act, the similarities and differences between that act and the Mississippi statutes and their application will be noted as occasions arise in the course of the discussion to follow.

The Mississippi Public Works Contract Act, as amended in 1980 and in 1982,⁷⁵ resembles the federal Miller Act in some respects and differs substantially in others. The general public works contracts sections apply to all contracts with the state or any of its political subdivisions for constructing any building,

not enough to warrant estoppel).

⁷³ See *General Elec. Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 (5th Cir. 1967)(section 270b(b) of Miller Act interpreted not to include "for which claim is made" language).

⁷⁴ See *United States ex rel. Aetna Drywall Contractors v. Aetna Casualty & Sur. Co.*, 725 F.2d 650, 650-51 (11th Cir. 1984)(plaintiff's cause not barred for failure to file within one year of supplying labor and materials at issue); *General Elec. Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 (5th Cir. 1967)(suit filed within one year from furnishing of last material was timely).

⁷⁵ MISS. CODE ANN. § 31-5-51 (Supp. 1984)(incorporating 1980 and 1982 amendments, 1980 Miss. Laws, ch. 520, effective April 1, 1981, and 1982 Miss. Laws, ch. 352, effective March 16, 1982).

making any repairs, or performing any work.⁷⁶

Highway contracts are the subject of a separate and special statute⁷⁷ which significantly broadens required statutory bond coverage for suppliers of various sorts. However, the general sections applicable to all public contracts continue to provide the procedure to be followed in actions on the construction bond on highway work.

The discussion at this point deals with the general sections. The special provisions which apply to highway contracts will be discussed later. The general public contracts sections will be referred to as the General Act and the highway contracts sections discussed later will be called the Highway Act.

A. Conditions of State Bonds and Coverage—In General

The General Act requires that construction bonds with "good and sufficient" sureties be given before work is commenced. The statute requires two bonds similar to those required by the federal Miller Act. One is a performance bond to be conditioned for the full and faithful performance of the contract. The second is a payment bond for the prompt payment of all persons supplying labor or material used in the prosecution of the work. Each bond will have a penalty at least equal to the amount of the contract.

The owner is covered exclusively under the performance bond. Under the payment bond, every person is covered who has furnished "labor or material" which is "used in the prosecution of the work" provided the claimant is either (1) a subcontractor of the contractor whose bond is involved or (2) a supplier of that subcontractor or (3) a direct supplier of the bonded contractor or (4) a laborer who has performed work on the project site itself.⁷⁸ No mention is made in the statute of "equipment" as in the case of the current highway bond.⁷⁹

⁷⁶ See Miss. CODE ANN. §§ 31-5-3 to -57 (1972 & Supp. 1984). However, it must be noted that in contracts for less than \$25,000, the owners may elect to pay in a lump sum upon completion and acceptance in lieu of making progress payments and in such cases may waive the "performance bond." *Id.* § 31-5-51(5).

⁷⁷ See *id.* § 65-1-85 (1972).

⁷⁸ *Id.* § 31-5-51 (Supp. 1984).

⁷⁹ See *id.*

B. Construction of State Bonds

Mississippi views construction bonds as a form of insurance and has adopted the broad view that the bond is to be liberally construed. However, the application of this rule is tempered with the caveats that the liability of a surety is governed by the express terms of its undertaking⁸⁰ and that the statutes governing such bonds must be given a reasonable construction to avoid extending the meaning beyond the language used by the Legislature.⁸¹ For the most part, the state court construction has been less liberal in extending bond coverage by implication than has been the construction given bonds on federal projects under the Heard Act and later under the Miller Act. The difference is apparent from a reading of the cases dealing with items such as equipment rental and repairs and material diverted from, or not actually used in, the work.

Since the 1980 revision of the state public bond statute includes some of the language also found in the Miller Act, the argument may now be made that Mississippi has abandoned its previous conservative view in favor of the drastically more liberal construction given by federal case law to expand coverage under the Miller Act bond on federal projects. The possible influence of the Miller Act cases in the application of state statutes is discussed below. However, a careful comparison indicates that the legislative move toward the Miller Act in 1980 by borrowing some of its language is limited to the procedural aspects of the law. Also, the language dealing with the basic coverage (labor and materials used in the work) has followed the preexisting state statute, which is inconsistent with the expanded coverage afforded by the federal case law as applied to Miller Act coverage.

To illustrate, the Miller Act, by its terms, protects persons "supplying labor and material in the prosecution of the work

⁸⁰ See *Metropolitan Casualty Ins. Co. v. Koelling*, 57 So. 2d 562, 564 (Miss. 1952)(advance payment made by plaintiff to contractor held to be outside scope of surety's contractual obligation); see also *National Union Fire Ins. Co. v. Currie*, 180 Miss. 711, 718, 178 So. 104, 105 (1938)(surety bound by terms of obligation).

⁸¹ See *Oliver Constr. Co. v. Crawford*, 142 Miss. 490, 501, 107 So. 877, 879 (1926)(statute should be liberally but reasonably construed).

provided for in said contract." A right of action is given to those not "paid in full" and judgment is to be for sums "justly due." The federal act does not by its terms require that the labor and material be "used" in the project or be supplied in the prosecution of the work "under" the contract.⁸² The Mississippi statute as amended, however, does not adopt the quoted language from the Miller Act. Instead, the state bond, by its terms, covers only those applying labor and material "*used in the prosecution of the work under said contract,*"⁸³ and a right of action is given only to those applying labor and material "*used in the prosecution of the work provided for in such contract.*"⁸⁴

The presence or absence of such terms as "used in" the work and supplies furnished "under" the contract has been found to be significant in allowing or disallowing claims for material furnished for the contract but diverted therefrom and not used in or under the contract in question, and claims for items such as tools and equipment, which may be supplied in the prosecution of the work but not used in or consumed in the process. The terms requiring that suppliers be "paid in full" all sums "justly due" have also attained significance in the the federal forum by expanding coverage to collateral agreements, such as those providing for safe transportation or, in some cases, legal expenses. Great care was obviously taken in drafting the 1980 revision of the state statute, and since none of the above mentioned Miller Act terms of art were borrowed and explicitly included in the state public works bond statute, there is no reason to suppose that those terms are to be included by implication.

The conclusion, therefore, is that Mississippi has not adopted the federal case law construing the Miller Act relevant to the extent of substantive bond coverage for labor and material claims on public works bonds, but adheres to its own case law as applied heretofore. On the other hand, Mississippi has

⁸² The significance of the absence of the word "used" in the Miller Act in relation to materials furnished in the prosecution of federal projects was especially noted in *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527, 529 (5th Cir. 1946); see also *United States ex rel. Carlson v. Continental Casualty Co.*, 414 F.2d 431, 433 (5th Cir. 1969).

⁸³ Miss. CODE ANN. § 31-5-51(1)(b)(Supp. 1984)(emphasis added).

⁸⁴ *Id.* § 31-5-51(2)(Supp. 1984).

borrowed and closely followed procedural portions of the federal act and as to these provisions, the Miller Act case law should be persuasive. These procedural matters include the ninety-day notice requirement and the application of the one-year limitation for the filing of a suit on the bond. These procedural requirements, though jurisdictional in nature, do not reach issues of substantive coverage under the state statutory bond but may serve to bar any claim that is not made and processed as the law requires.

C. Labor and Material Under State Bond

Like the Miller Act and its predecessor, the Mississippi statute requiring general public works bonds extends coverage expressly to persons supplying "labor or material." More precisely, the wording is that on public work the bond shall be conditioned for the "prompt payment of all persons supplying labor or material used in the prosecution of the work under said contract."⁸⁵ However, "labor or material" furnished in the prosecution of the work on federal projects is not always the same as labor or material "used in" the prosecution of the work "under" contract on state projects. One important difference is that on public projects of the state, exclusive of state highway projects, the statutory bond protects those who furnish materials which become part of the project or which are consumed on the job, but does not extend protection to persons supplying the necessary machinery or appliances to enable the contractor to perform the contract work.⁸⁶ The fact that the equipment items are partially or totally worn out on the job is not the proper test to

⁸⁵ *Id.* § 31-5-51(1)(b)(Supp. 1984).

⁸⁶ See *Watts v. Western Casualty & Sur. Co.*, 210 Miss. 211, 217, 49 So. 2d 255, 257 (1950)(rental freight on heavy equipment used in work not recoverable on bond); *United States Fidelity & Guar. Co. v. Yazoo County*, 145 Miss. 378, 387, 110 So. 780, 781 (1927)(surety not liable for equipment used by contractor in completing work); *Oliver Constr. Co. v. Crawford*, 142 Miss. 490, 501, 107 So. 877, 879 (1926)(money loaned to contractor for purchase of materials and for labor was not recoverable on bond). However, it should be noted that in *Houston Gen. Ins. Co. v. Maples*, 375 So. 2d 1012, 1016 (Miss. 1979), the court held that the rental for heavy equipment on a public works project was covered by the statutory bond. The court did not cite or attempt to distinguish the several cases holding to the contrary. Therefore, one must conclude that the law on this point is currently unsettled.

determine whether the items are covered by the bond.⁸⁷ But consumption on the job may indicate that the item in question is not equipment in the strict sense, such as lumber used for forming concrete, which has been allowed to the extent that it is consumed.⁸⁸ Another example is a tire used on heavy equipment, which may be covered to the extent of the portion consumed on the bonded contract.⁸⁹ Also, one who performs work with his own machine may be viewed as supplying labor as distinguished from equipment, as where a person agrees to dig a ditch and does this work with his own equipment.⁹⁰ Materials in the form of repair service or repair parts which are necessary to keep the equipment operating on an efficient basis are also excluded from the protection of the bond.⁹¹ Also, freight and charges for transporting equipment cannot be recovered in an action on the state bond.⁹² However, gas, oil, and other fuels necessary to operate the equipment are considered as material within the bond coverage.⁹³

The reason given for the exclusion of claims for items essential to contract performance is that the statute is designed to protect only those who furnish labor and material which either enters into and becomes a permanent part of the improvement,

⁸⁷ See *United States Fidelity & Guar. Co. v. Yazoo County*, 145 Miss. 378, 386, 110 So. 780, 781 (1927)(surety not liable for equipment which was worn out during completion of work by contractor).

⁸⁸ See *McElrath & Rogers v. W.G. Kimmons & Sons*, 146 Miss. 775, 790, 112 So. 164, 166 (1927)(where value of lumber consumed was recoverable on bond).

⁸⁹ See *Houston Gen. Ins. Co. v. Maples*, 375 So. 2d 1012, 1016 (Miss. 1979)(recovery for tires not allowed where no evidence of consumption on job is revealed).

⁹⁰ See *H.F. Vann Nieuwenhuyze & Sons Constr. Co. v. Irby*, 232 Miss. 474, 479-80, 99 So. 2d 651, 653 (1958).

⁹¹ See *Great Am. Ins. Co. v. Busby*, 247 Miss. 39, 53, 150 So. 2d 131, 137 (1963)(surety not liable for equipment repair); *McElrath & Rogers v. W.G. Kimmons & Sons*, 146 Miss. 775, 788, 112 So. 164, 167 (1927)(costs of equipment repairs disallowed); *United States Fidelity & Guar. Co. v. Yazoo County*, 145 Miss. 378, 386, 110 So. 780, 781 (1927)(costs for equipment maintenance not recoverable).

⁹² See *Western Casualty & Sur. Co. v. Stribling Bros. Mach. Co.*, 244 Miss. 12, 25, 139 So. 2d 838, 841 (1962); *Watts v. Western Casualty & Sur. Co.*, 210 Miss. 211, 217, 49 So. 2d 255, 257 (1950).

⁹³ See *Western Casualty & Sur. Co. v. Stribling Bros. Mach. Co.*, 244 Miss. 12, 25, 139 So. 2d 838, 841 (1962); *McElrath & Rogers v. W.G. Kimmons & Sons*, 146 Miss. 775, 788, 112 So. 164, 166 (1927); *Oliver Constr. Co. v. Crawford*, 142 Miss. 490, 501, 107 So. 877, 879 (1926).

or which is naturally and necessarily consumed in the performance of the work.⁹⁴ A tractor, for example, is not material, but only a tool which enables the contractor to handle the material; and the contractor is expected to have equipped himself in order to accept the contract in the beginning.

For the same reason, it has been concluded that material furnished ostensibly for the work, but which is diverted from and not actually used in the work, is not the kind of material for which the General Act provides coverage. Unlike the Miller Act coverage, those who supply such material are not extended protection under the state bond statute. The General Act protects only those persons supplying labor or material "used in" the project, and the cause of action granted is only for labor or materials "used in" the prosecution of the work for which payment has not been made.⁹⁵ It is not enough that the bonded contractor led the supplier to believe in good faith that the material was to be so used, as in the case of Miller Act situations.

Turning to the more remote relationships, subcontractors and sub-subcontractors of the prime contractor are covered by the prime contractor's bond, as are suppliers of labor or material to subcontractors,⁹⁶ but a supplier of a sub-subcontractor is expressly excluded from protection under the statute. Also, a materialman of a materialman is excluded.⁹⁷

IV. STATE HIGHWAY CONTRACTS

The Highway Act requires that the contractor provide a bond conditioned for the faithful performance of the contract and "for the prompt payment of all persons furnishing labor,

⁹⁴ See *United States Fidelity & Guar. Co. v. Yazoo County*, 145 Miss. 378, 386, 110 So. 780, 781 (1927).

⁹⁵ Miss. CODE ANN. § 31-5-51 (Supp. 1984); see *McElrath & Rogers v. W.G. Kimmons & Sons*, 146 Miss. 775, 787, 112 So. 164, 165 (1927); *United States Fidelity & Guar. Co. v. Yazoo County*, 145 Miss. 378, 386, 110 So. 780, 781 (1927).

⁹⁶ See Miss. CODE ANN. § 31-5-51 (Supp. 1984).

⁹⁷ *Webb v. Blue Lightning Serv. Co.*, 237 Miss. 862, 871, 116 So. 2d 753, 755 (1960). Prior to the passage of Miss. CODE ANN. § 31-5-51 (Supp. 1984), coverage extended to suppliers of sub-subcontractors. *Mississippi Rd. Supply Co. v. Western Casualty & Sur. Co.*, 246 Miss. 510, 520, 150 So. 2d 847, 851 (1963) (recovery allowed on bond by materialmen of sub-subcontractor).

material, equipment, and supplies therefor.”⁹⁸ Since the Highway Act mentions equipment along with labor and material, the court was called upon to determine what the legislature intended to include by the phrase “equipment, and supplies therefor.”

In 1933 the Mississippi Supreme Court held that the rental of equipment was a covered bond item.⁹⁹ Therefore, a person supplying a subcontractor with a crane with dragline attachments for use in highway construction was allowed to recover the rental in an action on the bond.¹⁰⁰ Later, however, this ruling was severely restricted by disallowing claims for the use value of heavy construction equipment which, though employed in the work, substantially survives the performance of the project and can be used on other contracts, unless the need for the special piece of equipment was unforeseeable when the contract was awarded.¹⁰¹ The same restrictive rule was also applied to exclude major replacements or improvements to machinery which add to its value and take on the characteristics of new equipment acquisitions, inconsistent with the concept of operating repairs.¹⁰² On the other hand, the term “equipment” was found to encompass day-to-day repairs necessary to keep the equipment operating.¹⁰³

However, the Legislature was unhappy with the restrictive decision and in 1968 amended the Highway Act to include the following paragraph:¹⁰⁴

With respect to equipment used in the construction, reconstruction, or other public work authorized to be done under the

⁹⁸ Miss. CODE ANN. § 65-1-85 (Supp. 1984).

⁹⁹ See *Shuptrine v. Jackson Equip. & Serv. Co.*, 168 Miss. 464, 468, 150 So. 795, 796 (1933) (“equipment” must include rental on equipment for time used under contract).

¹⁰⁰ *Id.*

¹⁰¹ See *Transamerica Ins. Co. v. Carter Equip. Co.*, 206 So. 2d 632, 635 (Miss. 1968) (surety not liable for rental purchase payments on tractor with useful life greatly in excess of particular contract); *Euclid-Mississippi v. Western Casualty & Sur. Co.*, 249 Miss. 779, 784, 163 So. 2d 904, 905 (1964) (surety not liable for balance of purchase price on equipment which will be used on other projects).

¹⁰² See *Euclid-Mississippi v. Western Casualty Sur. Co.*, 249 Miss. 779, 790, 163 So. 2d 904, 908 (1964).

¹⁰³ *Id.*

¹⁰⁴ Miss. CODE ANN. § 65-1-85 (Supp. 1984).

provisions of this chapter: the word 'equipment,' in addition to all equipment incorporated into or fully consumed in connection with such project, shall include the reasonable value of the use of all equipment of every kind and character and all accessories and attachments thereto which are reasonably necessary to be used and which are used in carrying out the performance of the contract, and the reasonable value of the use thereof, during the period of time the same are used in carrying out the performance of the contract, shall be the amount as agreed upon by the persons furnishing the equipment and those using the same to be paid therefor, which amount, however, shall not be in excess of the maximum current rates and charges allowable for leasing or renting as specified in section 65-7-95; the word 'labor' shall include all work performed in repairing equipment used in carrying out the performance of the contract, which repair labor is reasonably necessary to the efficient operation of said equipment; and the words 'materials' and 'supplies' shall include all repair parts installed in or on equipment used in carrying out the performance of the contract, which repair parts are reasonably necessary to the efficient operation of said equipment.¹⁰⁵

The above provision is broad enough to include not only leased or rented equipment, but also the costs of purchased equipment, at least to the extent of "the reasonable value of the use thereof." On the other hand, the quoted amendment leaves in effect the rule disallowing major repairs as distinguished from those necessary to the "efficient operation of the equipment."

Another statute enacted in 1976 by the Mississippi Legislature imposes the requirement that a creditor of a subcontractor, to whom a balance remains due for purchased equipment, must notify the prime contractor of any payments not timely made or forfeit his claim on the bond for equipment "leased, rented or sold."¹⁰⁶ Notice must be given within 30 days after such payment is due.¹⁰⁷

The highway bond in current use is also conditioned for the

¹⁰⁵ *Id.*

¹⁰⁶ Act of April 26, 1976, ch. 378, 1976 Miss. Laws 509 (codified at MISS. CODE ANN. § 31-5-31 (Supp. 1984)).

¹⁰⁷ *Id.*

payment of insurance and bond premiums, which are not mentioned in the Highway Act. With the exception of the areas of equipment, equipment repairs, and insurance premiums, the bond on highway work has a coverage equivalent to the bond required by the General Act, with one very important addition discussed below.

The bond in current use, but not the Highway Act, contains an additional obligation for the payment of "all of the expense and cost and attorney's fees that may be incurred in the enforcement of the performance of said contract, or in the enforcement of the conditions and obligations of this bond." This provision has been enforced even where no suit is actually filed on the bond, if legal services become necessary and are rendered in processing a claim which is settled short of litigation. However, costs and fees may not be recovered for filing a premature suit on the bond.¹⁰⁸

V. ACTIONS ON STATE PUBLIC CONTRACTS BONDS

The General Act governs the condition under which an action by a third party may be brought. These statutes created a right of action which previously did not exist. Since the action on the bond is statutory, the requirements provided in the statutes must be observed in all essential respects.

A. *Time*

There are three critical time periods under the statutes. The first is a ninety-day waiting period before suit on the bond can be effectively filed. A second critical time period is the one-year limitation for filing suit after the cause of action has accrued. The third is a ninety-day period within which notice must be given of claims based upon furnishing labor or materials to a subcontractor. Each is discussed below.

B. *The Ninety-Day Waiting Period*

There is a waiting period of ninety days from the date on

¹⁰⁸ Day v. Royce Kershaw, Inc., 185 Miss. 207, 215-16, 187 So. 221, 223 (1939).

which the last item claimed against the bond was performed or furnished.¹⁰⁹ Formerly, the period was fixed at six months from publication of final completion of the contract.¹¹⁰ Any attempt by a materialman to sue within the waiting period is premature.¹¹¹ The court lacks jurisdiction of a suit prematurely brought and does not acquire jurisdiction of such an action merely by the expiration of the ninety-day period while the suit remains on the court's docket.¹¹² In other words, the pendency of a premature suit will not prevent the claim from being time barred by the expiration of the limitation period. To accomplish this, there must be a refile after the waiting period has expired.¹¹³

C. *The Ninety-Day Notice Requirement Under the State Act*

A sub-subcontractor and those supplying labor or materials to a subcontractor of the bonded contractor must give the specified ninety-day notice as a condition precedent to asserting a valid claim on the contractor's bond. That notice must state "with substantial accuracy" the amount claimed and the name of the party to whom the claimed items were supplied. The notice must be in writing. It must be given within ninety days from the date on which the last item claimed was supplied. It may be given by delivery of the writing in person or the written notice may be mailed by certified mail. The notice may be given either to the contractor or the surety, but need not be given to both. No action may be maintained unless the notice shall have been

¹⁰⁹ MISS. CODE ANN. § 31-5-51(2)(Supp. 1984).

¹¹⁰ See *id.* § 31-5-5 (1972), *repealed by* Act of May 23, 1980, ch. 520, § 5, 1980 Miss. Laws 1230, 1233.

¹¹¹ See *Day v. Royce Kershaw, Inc.*, 185 Miss. 207, 214, 187 So. 221, 223 (1939)(action brought prematurely where notice had not been published and six months from notice date had not expired).

¹¹² See *Euclid-Mississippi v. Western Casualty & Sur. Co.*, 249 Miss. 547, 555, 163 So. 2d 676, 679 (1964). In *Euclid*, the suit was prematurely brought as it was filed during the waiting period. The appellants argued that upon the subsequent expiration of the waiting period, the court automatically acquired jurisdiction. The court rejected this contention stating that the passage of the waiting period while the suit is on the docket, without refile, is insufficient to give the court jurisdiction. *Id.*

¹¹³ *Id.*

given within the ninety days and substantially in the manner prescribed.

This notice provision is similar to and, indeed, closely follows the language of the Miller Act. The previous discussion of the subject under the federal act also applies, by analogy, with equal force to the application of the same provision to contracts let on the state level.

D. One-Year Limitation

Once the ninety-day waiting period has expired, the third party may file his suit; but this suit is subject to a one-year statutory bar if not timely filed. The time limitation begins to run from the date the owner publishes a notice of final completion or of abandonment of the contract. The publication is to be in a newspaper published, or of general circulation in the county where some part of the work was done out of which the claim arises.¹¹⁴ The publication is to be made only after the complete performance and final settlement of the contract, or after the contractor quits or abandons the contract.¹¹⁵ A determination of final completion by the owner is enough to authorize publication without the final payment having been made.¹¹⁶

The 1980 Act includes the same one-year limitation, whether the action is on the "payment" or "performance" bond, and the conditions as to both are the same.¹¹⁷ It follows that an owner faces the same limitations bar as a third-party claimant.

E. Number of Actions

Prior to the 1980 amendment, the original Act provided that only one suit could be brought, and all claimants could be required to intervene. Under the new Act, there is no limit on the number of separate suits that may be filed on the payment bond on public works projects. Also, the surety may not require that all possible claimants be joined in one action. Further, one

¹¹⁴ MISS. CODE ANN. § 31-5-53 (Supp. 1984).

¹¹⁵ *Id.*

¹¹⁶ *Dixie Minerals Corp. v. Dixie Asphalt Paving Co.*, 172 Miss. 218, 224, 159 So. 562, 564 (1935).

¹¹⁷ *See* MISS. CODE ANN. § 31-5-53 (Supp. 1984).

claimant is not obligated to intervene in a suit first filed by another claimant.

F. Parties and Venue

Since the General Act has a built-in venue provision, the general venue statutes do not apply. The provision states that venue in an action on the bond shall be in the county where the bonded contract or some part thereof was performed or in the county where service of process may be obtained upon either the principal in or the surety on such bond.¹¹⁸ The contractor-principal is not a necessary party and the bonding company may be sued alone.¹¹⁹ Since most corporate sureties are insurance companies, they are subject to suit and service of process in any county in which there is an agent on whom process may be served.¹²⁰

G. Process

Prior to the amendment in 1980, one section of the General Act provided that interested parties were to be summoned and that notice of the pendency of the suit was to be made by publication in some newspaper of general circulation published in the county or town where the contract was being performed. This provision was said to be jurisdictional, but notice by publication is no longer a part of the statutory scheme and is not necessary or appropriate.¹²¹

H. Joinder of Causes of Action

A court of equity may entertain a suit on several separate contracts where the contractor, the surety, and the owner are the same.¹²² However, the chancery court may not acquire juris-

¹¹⁸ *Id.*

¹¹⁹ See *Marquette Cement Mfg. Co. v. Fidelity & Deposit Co.*, 173 Miss. 164, 174, 158 So. 924, 926 (1935)(contractor not necessary party to suit on surety bonds).

¹²⁰ See MISS. CODE ANN. § 11-11-7 (1972).

¹²¹ See *id.* § 31-5-13 (1972), repealed by Act of May 23, 1980, ch. 520, § 5, 1980 Miss. Laws 1230, 1233.

¹²² See *United States Fidelity & Guar. Co. v. Plumbing Wholesale Co.*, 175 Miss. 675, 687, 166 So. 529, 532 (1936)(where action involved three separate contracts and one

diction where the causes of action are separate and distinct and the rights of the different parties are not affected by the outcome of the other contract.¹²³

I. Essential Allegations of the Declaration or Complaint

The complaint must allege facts sufficient to fix venue. It must allege when the last item was supplied and that the ninety-day waiting period has expired. In a case involving supplies to a subcontractor, the complaint must allege that the required notice was given within the ninety-day time allowance or allege facts showing a waiver of the time provisions of the statute. The complaint should also state that the one-year statute of limitations has not barred the claim by establishing that no publication of final settlement or abandonment has been made or that publication was made less than one year prior to the date of filing suit.

J. Abatement of Actions Under Contracts Subject to Conditions

After an action has been properly filed, it is subject to abatement under the circumstances set forth in the statute.¹²⁴ The action is subject to suspension if the amount claimed in the suit is subject to provisions or conditions of the contract between the claimant and the contractor. Abatement of the action will continue in such cases pending performance or fulfillment of the contract conditions.¹²⁵ For example, material incorporated in the work and supplied by the claimant may be subject to approval by or in behalf of the owner or a percentage of the amount otherwise due and payable to a subcontractor may be subject to withholding by the contractor, pending final completion of the project and settlement with the owner. The existence

contractor with same surety on all three bonds, court of equity had jurisdiction).

¹²³ See *Marquette Cement Mfg. Co. v. Fidelity & Deposit Co.*, 173 Miss. 164, 175, 158 So. 924, 926 (1935) (where eleven separate and distinct contracts guaranteed by separate bonds with different sureties, court of equity lacked jurisdiction even though subcontractor had cause of action on all contracts).

¹²⁴ See MISS. CODE ANN. § 31-5-51(2) (Supp. 1984).

¹²⁵ See *id.*

of these contractual conditions does not extend the time periods for filing suit, but, if timely pleaded, may serve to abate the action after the filing. The abatement, however, will not persist if approval or settlement is "a result of unreasonable acts of the contractor."¹²⁶

VI. PRIVATE CONTRACTS

The Mississippi Code's chapter on liens¹²⁷ includes a series of sections dealing with construction bonds and how actions upon such bonds may be maintained. These will be referred to collectively as the Private Act to distinguish this subject from the public works bonds.

The furnishing of a bond on private construction work is not mandatory. The law does not specify the amount of a bond, if furnished, but leaves the decision to the owner and the contractor. However, if a bond is furnished to guarantee performance by the contractor, it shall, by the terms of the statute, be subject to the additional obligations that "such contractor or subcontractor" shall "promptly" make payments to all persons furnishing "labor or material under said contract." If the bond, as written, fails to include these provisions, they are nevertheless included by force of the statute. The United States Supreme Court has ruled that such provisions do not unduly interfere with the liberty of contract or violate the Fourteenth Amendment to the United States Constitution.¹²⁸ A cause of action may be maintained by any person who has furnished labor or materials "used therein."¹²⁹

While the language of the private contract bond statute is similar in its wording to the General Act dealing with public

¹²⁶ See *id.*; *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 842 (5th Cir. 1983)(court applied test of reasonableness to time for which contractor could withhold payment from subcontractors); see also Act of April 20, 1984, ch. 406, 1984 Miss. Laws 168, 168-70 (outlines procedure for retainage of payments on contracts other than those with Mississippi State Highway Commission).

¹²⁷ See MISS. CODE ANN. §§ 85-7-181 to -201 (1972 & Supp. 1984).

¹²⁸ See *Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co.*, 291 U.S. 352, 361 (1934); see also *United States Fidelity & Guar. Co. v. Parsons*, 147 Miss. 335, 368, 112 So. 469, 477 (1927)(liens granted by legislature to subcontractors valid even in light of fourteenth amendment guarantees).

¹²⁹ MISS. CODE ANN. § 85-7-185 (1972).

work, it has received a more restrictive construction and application. There is no liability on the private bond to a materialman of a subcontractor or to a subcontractor of a subcontractor. The statutory bond extends protection only to those who supply labor or material to the contractor directly, because only those persons supply labor and material "under the contract."¹³⁰ There is no liability in any event on a private statutory bond for equipment rental, transportation of equipment, repairs to equipment, or parts used in making such repairs because this is not "labor or material."¹³¹

In applying these exclusionary rules, it is necessary to distinguish between public and private bonds. The fact that the work is for a public authority does not make the bond given by a subcontractor to the prime contractor on the public project a public bond. On the contrary, a subcontractor's bond has consistently been viewed as purely private although the work being done is public. This holds true whether the work is federal or state.¹³²

Absent a bond on private contracts, a supplier of the contractor may give to the owner a stop notice and acquire a lien on the thing being constructed to the extent of the balance due the contractor remaining in the owner's hands when the notice is received.¹³³ However, when a bond is given, the bond is in lieu of

¹³⁰ *Id.*; see *Redd v. L & A Contracting Co.*, 246 Miss. 548, 553-54, 151 So. 2d 205, 207 (1963)(contractor not required by statute to hold funds owed to subcontractor until remote sub-subcontractor has been paid); *United States Fidelity & Guar. Co. v. Maryland Casualty Co.*, 191 Miss. 103, 118, 199 So. 278, 282 (1940)(labor and materials furnished to subcontractor not covered by bond statute); *Alabama Marble Co. v. United States Fidelity & Guar. Co.*, 146 Miss. 414, 420, 111 So. 573, 574 (1927)(bond held to protect only those who furnish materials to principal contractor, because statute expressly refers to "contract").

¹³¹ *Great Am. Ins. Co. v. Busby*, 247 Miss. 39, 52-53, 150 So. 2d 131, 137 (1963).

¹³² See *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 260 (8th Cir. 1969)(subcontract on federal Miller Act project held to be private contract and governed by state law); *United States Fidelity & Guar. Co. v. Dedeaux*, 168 Miss. 794, 798, 152 So. 274, 274 (1934)(where materials were furnished to subcontractor and bond ran to principal contractor, statute not applicable even though contract for public road); *Davis Co. v. D'Lo Guar. Bank*, 162 Miss. 829, 845, 138 So. 802, 805 (1932)(agreement between contractor and county for repair of bridge governed by statutes concerning public bonds; however, agreement between subcontractor and contractor for same work held strictly private matter).

¹³³ See *MISS. CODE ANN.* § 85-7-181 (1972).

the supplier's equity in the contract funds.¹³⁴ In such a case, the supplier has no stop notice rights and must look only to the bond. Additionally, it should be noted that stop notice rights do not extend in any event, whether or not a bond is furnished, to persons who do not furnish labor or material directly to the contractor. For example, one who supplies material to a subcontractor has no stop notice rights.¹³⁵

The conditions precedent for maintaining an action on the bond given under the Private Act are similar to those which apply to actions on public works bonds, with two important exceptions.¹³⁶ One exception relates to the waiting time for filing suit. On private bonds, there is a six-month waiting time which begins to run from the "completion and final settlement" of the contract or from the time when the contractor quits or abandons the contract before its completion.¹³⁷ Neither the material supply date nor the newspaper publication date of completion or abandonment is the event which activates the waiting time condition. Therefore, a supplier may file suit at any time after six months from the date of the completion or abandonment, although no publication has been made. This results from a careful regard for the language of the statute. The section governing the private bond provides that the "period for the *limitation* of the institution of said action shall not begin to run until" the publication is made, but fails to tie the time for institution of the action in the beginning to this publication requirement.¹³⁸ On the other hand, the one-year period which serves to bar the action never begins to run until the publication is made. The fact that publication is rarely made by private owners does not

¹³⁴ See *Dickson v. United States Fidelity & Guar. Co.*, 150 Miss. 864, 878-79, 117 So. 245, 248 (1928), followed in *Davis Co. v. D'Lo Guar. Bank*, 162 Miss. 829, 845-46, 138 So. 802, 806 (1932).

¹³⁵ See *Monroe Banking & Trust Co. v. Allen*, 286 F. Supp. 201, 207 (N.D. Miss. 1968)(right to acquire lien by notice not extended to those who supply material or labor to subcontractor); *Redd v. L & A Contracting Co.*, 246 Miss. 548, 554, 151 So. 2d 205, 207 (1963)(letters insufficient to establish right of sub-subcontractor to payment); *Alabama Marble Co. v. United States Fidelity & Guar. Co.*, 146 Miss. 414, 421, 111 So. 573, 574 (1927)(notice insufficient to establish lien on behalf of subcontractor).

¹³⁶ See Miss. CODE ANN. §§ 85-7-185 to -201 (1972 & Supp. 1984).

¹³⁷ *Id.* §§ 85-7-187, -189 (1972).

¹³⁸ See *id.* § 85-7-189 (1972)(emphasis added).

change the rule, since custom cannot change the law as written.¹³⁹

The second exception is the requirement that "only one action shall be brought" with all parties being required to intervene in that first suit within the time limit for bringing an original suit.¹⁴⁰ When the first suit is filed on the bond, all interested parties are entitled to "due process" notice to intervene. The precise manner in which claimants must be notified and the identity of the one having the burden of providing notice are presently undecided questions, but it is suggested that the plaintiff should cause notice to intervene to be personally served on all potential claimants who can be discovered by a diligent inquiry and that unknown claimants be given notice by newspaper publication.¹⁴¹ If the total recovery in such an action is inadequate to pay all claims after the owner is fully satisfied, the claimants whose claims are established will be paid pro rata.¹⁴² If the one-year statute of limitations is ever set in motion, the "only one action" provision can have disastrous results for those who fail to receive actual notice of the first suit. This results because the filing of a second suit in lieu of intervening in the first action does not toll the running of the limitation period.¹⁴³

Finally, although a bond on private projects is not mandatory, once a bond is furnished, it stands in lieu of any lien rights which might otherwise have existed, including those rights derivable through a statutory "stop notice." A supplier must then look exclusively to the bond for security and may not law-

¹³⁹ *Transamerica Ins. Co. v. Paine Supply Co.*, 194 So. 2d 490, 491 (Miss. 1967).

¹⁴⁰ See Miss. CODE ANN. § 85-7-191 (1972).

¹⁴¹ See *id.* § 85-7-195 (1972); *United States Fidelity & Guar. Co. v. Dedeaux*, 168 Miss. 794, 799, 152 So. 274, 275 (1934) (requirement of publication where a private bond is involved is not jurisdictional). On the process questions see *American Fidelity Fire Ins. Co. v. Athens Stove Works*, 481 So. 2d 292 (Miss. 1985).

¹⁴² Miss. CODE ANN. § 85-7-193 (1972).

¹⁴³ See *United States Fidelity & Guar. Co. v. Dedeaux*, 168 Miss. 794, 799, 152 So. 274, 275 (1934) (where competent jurisdiction was obtained, subsequent suit was dismissed). The same rule was applied in suits filed under the Heard Act which contained language similar to that in the Mississippi statute. See *Mandel v. United States ex rel. Wharton & N.R. Co.*, 4 F.2d 629, 632 (3d Cir. 1925) (failure to file claim in first suit as required by statute extinguished court's power to enforce second suit); *United States ex rel. Joseph Tino & Co. v. Rangely Constr. Co.*, 288 Fed. 76, 77 (D.C.N.Y. 1923) (failure to intervene in suit within one-year period bars action).

fully assert a lien on the premises under construction.¹⁴⁴ A false notice of lien recorded in these circumstances will be subject to a severe statutory penalty.¹⁴⁵

VII. NON-STATUTORY BOND OBLIGATIONS

In some jurisdictions—for example, Louisiana¹⁴⁶—it is against public policy for public authorities to require or accept construction bonds on public work projects which exceed the coverage as allowed by statute. In such jurisdictions, the excess coverage creates no liability and the provisions, being void, are simply disregarded. Doubtless, one reason is that added liability cuts down the amount of the penalty otherwise available to the public authority.

Mississippi takes a different view. In this jurisdiction, it is recognized that the right of the public authority to require a bond for the benefit of third parties who supply the public works contractor is inherent.¹⁴⁷ Bonds exceeding the statutory minimum coverage have been given effect in a number of cases.¹⁴⁸

¹⁴⁴ See *Dickinson v. United States Fidelity & Guar. Co.*, 150 Miss. 864, 878, 117 So. 245, 248 (1928)(where bond is given, funds are released from such equity).

¹⁴⁵ Miss. CODE ANN. § 85-7-201 (1972) provides that "[a]ny person who shall falsely and knowingly file the notice mentioned in section 85-7-197 without just cause shall forfeit to every party injured thereby the full amount for which such claim was filed, to be recovered in an action by any party so injured at any time within one year from such filing" For purposes of the statutory penalty for false notice of lien, it is immaterial whether the lien notice is recorded on the *lis pendens* docket or is recorded in the construction lien record. *Hicks v. Greenville Lumber Co.*, 387 So. 2d 94, 97 (Miss. 1980).

¹⁴⁶ See *Patent Scaffolding Co. v. Ross Corp.*, 172 So. 2d 364, 367 (La. 1965)(provisions of mandatory statutory bond cannot be enlarged by agreement to cover rental of equipment). *But see Valliant v. State Dept. of Transp. & Dev.*, 437 So. 2d 845, 849 (La. 1983)(extension of bond to cover all debts, whether or not covered by public works statutes, allowed since agreed to for consideration).

¹⁴⁷ See *National Sur. Co. v. Hall-Miller Decorating Co.*, 104 Miss. 626, 633, 61 So. 700, 702 (1913)(requirement of furnishing bond as condition to letting contract held within power of board of trustees).

¹⁴⁸ See, e.g., *Seaboard Sur. Co. v. Bosarge*, 226 Miss. 482, 486, 84 So. 2d 517, 519 (1956)(where surety guaranteed principal would perform contract, fuel and repairs essential to motor vehicles necessary for contract were covered); *Hartford Accident & Indem. Co. v. Hewes*, 193 Miss. 850, 854, 11 So. 2d 309, 310 (1943)(where bond guaranteed performance and all modifications of contract, oral promise to pay for liability insurance covered by bond); *Linde Air Prod. Co. v. American Sur. Co.*, 168 Miss. 877, 882, 152 So. 292, 293 (1934)(held statute permits parties to insert "such provisions and penalties" as

As previously noted, the bond in current use on state highway work is conditioned to pay bond and insurance premiums and attorney's fees incurred in enforcing the bond obligations, which are items not mentioned in the Highway Act. When these bond obligations are in addition to the requirements of the statutes, they become common-law obligations to suppliers, who become third-party beneficiaries.¹⁴⁹ Whether such claimants are free from the statutory conditions for maintaining actions on the bond remains an open question.

One added provision of special interest takes the form of a ninety-day notice requirement that must be met by a supplier of a subcontractor as a condition precedent to fixing liability against the bond of the general contractor. Such a notice is now required by the federal Miller Act¹⁵⁰ and, since 1980, by the Mississippi statute dealing with public works bonds in general.¹⁵¹ However, a similar provision has found its way into bond forms for private projects as currently recommended by the American Institute of Architects (AIA). This provision extends bond coverage to suppliers of subcontractors and then conditions liability under the bond upon the giving of written notice within ninety days to "any two of the following: [T]he principal, the owner, or the surety."¹⁵² Such a "dual notice" provision is reasonable¹⁵³ and valid, even when the bond is otherwise statutorily based and the statute makes no provision therefor.¹⁵⁴ Since the notice requirement in no way affects the time within which suit must be brought, it is not voided by the statute which proscribes any

they desire).

¹⁴⁹ See *Hartford Accident & Indem. Co. v. Hewes*, 193 Miss. 850, 856, 11 So. 2d 309, 311 (1943)(modification created obligation on part of subcontractor to pay insurance premiums to principal who was third party beneficiary); *Yazoo & M.R.V. Co. v. Sideboard*, 161 Miss. 4, 14, 133 So. 669, 671 (1930)(third party may recover directly on contract made for his benefit).

¹⁵⁰ 40 U.S.C. § 270a (1982).

¹⁵¹ MISS. CODE ANN. § 31-5-51 (Supp. 1984).

¹⁵² AIA Doc. No. A311, at 4 (1970).

¹⁵³ A "dual notice" provision was found to be reasonable in a "Capehart" bond in *Continental Casualty Co. v. United States ex rel. Robertson Lumber Co.*, 305 F.2d 794, 799 (8th Cir. 1962).

¹⁵⁴ See *Western Casualty & Sur. Co. v. Honeywell, Inc.*, 380 So. 2d 1385, 1389 (Miss. 1980).

change by the contract of the statutes of limitations.¹⁵⁵

VIII. INTEREST AND ATTORNEY'S FEES IN BOND CLAIM LITIGATION

In state court actions, the plaintiff is entitled to recover interest at the legal rate from the due dates of the invoices for items which the contractor and his surety are liable on the contract bond.¹⁵⁶ Although there is a mandatory waiting period before a suit can be filed on the bond by a supplier of labor and material, the statutes require that the bond on both public and private contracts be conditioned on the contractor's "prompt payment" to persons supplying labor and material. Since the obligation assumed is prompt payment and since the right to pay the item when due is not postponed by statute, the liability of the surety on the bond for interest begins with the due date of material invoices. The beginning of interest accruals is not postponed by the waiting period imposed by the statutes¹⁵⁷ or even by the absence of notice of the existence of the debt.

Attorney's fees fall into a different category. This litigation expense is not recoverable under the general law in this country unless provided for by statute, enforceable contract, or imposed as a part of punitive damages, as in the case of an action based upon fraud or willful tort.¹⁵⁸

Although the bond in current use on state highway projects provides expressly for the recovery of attorney's fees, no federal statute authorizes the shifting of legal fees in litigation involving federal projects or in litigation involving private contracts gov-

¹⁵⁵ See *id.* (notice provision did not limit time to bring suit under statute).

¹⁵⁶ See *Faulkner Concrete Pipe Co. v. United States Fidelity & Guar. Co.*, 218 So. 2d 1, 4 (Miss. 1969)(appellant entitled to interest upon amount due from date when payment should have been made); *Mississippi Fire Ins. Co. v. Evans*, 153 Miss. 635, 648, 120 So. 738, 743 (1929)(materialmen allowed interest on money due them from date that money became due); *Stowell v. Clark*, 152 Miss. 32, 39, 118 So. 370, 372 (1928)(amount due under account or contract bears interest from time it is due and payable unless otherwise provided by agreement of parties).

¹⁵⁷ See *Faulkner Concrete Pipe Co. v. United States Fidelity & Guar. Co.*, 218 So. 2d 1, 4 (Miss. 1969)(interest runs from due date of invoice).

¹⁵⁸ See *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)(each party bears cost of legal representation unless opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons).

erned by state law. However, in 1980, the legislature enacted a statute providing for the recovery of attorney's fees by the prevailing party in litigation involving public works bonds governed by state law, subject to certain conditions.¹⁵⁹

The conditions relate to whether the action or defense is reasonable and is filed or conducted in good faith and the allowance is left in all cases to the judgment and sound discretion of the trial judge. Fees may be awarded to the defendant if the action is brought "without just cause or in bad faith." Fees may be awarded to the plaintiff if the action, once filed, is resisted by a defense which is "not reasonable, or not in good faith," or is "merely for the purpose of delaying payment." The statute concludes with the proviso that it shall not affect the right of any person to recover attorney's fees "where provided by contract or bond." This preserves the right of the public authority to exact a bond providing for such fees, as in the case of the bond in current use on state highway projects, and likewise preserves the right of private parties to include like contractual stipulations.

On the state bond, efforts to support claims for attorney's fees under general statutes which are not part of the series of statutes regulating the scope of construction bond coverage have not been successful. To recover such fees, the claimant must be able to point to a contract or statute¹⁶⁰ under which a bond surety is bound, such as an express reference to liability in the bond itself or in the underlying contract between the principal and the obligee in the bond. Thus, a general statute dealing with the allowance of fees in actions under an "open account," such as the one enacted in 1980,¹⁶¹ cannot be invoked as a basis for recovery against a surety on a private or public state level construction bond.¹⁶² However, the statute may still be used by a

¹⁵⁹ See MISS. CODE ANN. § 31-5-57 (Supp. 1984).

¹⁶⁰ See *id.* (allowing award of fees where judge finds that defense raised in action on construction bond is not reasonable or not made in good faith or made for purpose of delaying payment).

¹⁶¹ *Id.* § 11-53-81 (Supp. 1984).

¹⁶² See *Kimberly-Clark Corp. v. Alpha Bldg. Co.*, 591 F. Supp. 198, 204 (N.D. Miss. 1984)(claimant on contract surety bond is not entitled to recover attorney's fees unless statute or contract with surety so provides); cf. *Stanton & Assoc., Inc. v. Bryant Constr. Co.*, 464 So. 2d 499, 503 (Miss. 1985)(unliquidated claim does not meet itemization standards necessary to qualify as open account for purpose of award of attorney's fees).

creditor directly against the contractor-principal personally in a common-law action on an open account, as is true of claims against any other open account debtor.¹⁶³

For comparison purposes, it is again noted that while the Miller Act also has no provision for the allowance of such expense items, it does provide for the recovery of "sums justly due" and it does confer the right upon persons who have not been "paid in full" for labor and material supplied in the prosecution of the work.¹⁶⁴ These terms, where liberally applied to supply contracts which expressly provide for the recovery of attorney's fees in case of a default in making payments when due, may authorize an award of such expense items as a part of the contract price for labor or material.¹⁶⁵ No such construction has been applied to state statutes dealing with contracts on the state level. Under Mississippi law, contrary to the rule in Miller Act cases, the only contract provision that is enforceable against the payment bond must be found in the bond itself or in the contract with the obligee for which the bond is written.¹⁶⁶ Apart from the supply contract, pre-judgment interest that is author-

¹⁶³ See MISS. CODE ANN. § 11-53-81 (Supp. 1984).

¹⁶⁴ 40 U.S.C. § 270b (1982).

¹⁶⁵ See *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126 (1974)(attorney's fees not ordinarily recoverable in absence of contract providing therefor); *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 220 (1957)(trustees entitled to recover attorney's fees since these must be included if employees are to be "paid in full sums justly due" them); *Gergora v. R.L. Lapp Forming, Inc.*, 619 F.2d 387, 390 (5th Cir. 1980)(plaintiff entitled to attorney's fees under terms of contract); *United States ex rel. Carter Equip. Co., Inc. v. H.R. Morgan, Inc.*, 554 F.2d 164, 166 (5th Cir. 1977)(contractual provision for attorney's fees enforceable under Miller Act); *D & L Constr. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009, 1013 (8th Cir. 1964)(defendants liable for attorney's fees where such fees are made part of purchase price of materials and are sums justly due by express contract); *Continental Casualty Co. v. United States ex rel. Conroe Creosoting Co.*, 308 F.2d 846, 849 (5th Cir. 1962)(bond providing that surety was liable for such sums as might be justly due entitled unpaid subcontractors suing on bond to recover reasonable attorney's fees).

¹⁶⁶ See *United States ex rel. Mississippi Rd. Supply Co. v. H.R. Morgan, Inc.*, 542 F.2d 262, 269 (5th Cir. 1976)(under state law, attorney's fees could not be awarded in action on contractor's bond absent provision for payment of attorney's fees in bond); *Kimberly-Clark Corp. v. Alpha Bldg. Co.*, 591 F. Supp. 198, 204 (N.D. Miss. 1984)(claimant on contract surety bond not entitled to recover attorney's fees unless contract with surety so requires); *Faulkner Concrete Pipe Co. v. United States Fidelity & Guar. Co.*, 218 So. 2d 1, 3 (Miss. 1969)(where surety bond fails to authorize attorney's fees, contractor is not entitled to recover attorney's fees from surety).

ized under state law has been recognized as a part of the amount "justly due" claimants under the Miller Act.¹⁶⁷

IX. CONTRACTOR FINANCING AND ASSIGNMENTS

Few public works contractors could long survive without outside financing. The primary financing is usually accomplished by contract arrangements for progress payments on periodic estimates of a percentage of work performed. These progress payments, called "progress estimates," are usually approved by the owner's representative and are paid each month. The formula usually employed to calculate the payments is the estimated work completed, plus the value of materials stored on the project site, less a specified percentage, usually ten percent. The specified retainage, called the "final retainage," is held pending satisfactory performance of the entire contract. Secondary financing, so called for lack of a more convenient name, is often required, usually taking the form of construction loans by commercial banks, secured by assignments of the payments to become due from the owner under the construction contract.

On federal projects, the assignment of contract proceeds is the subject of an act of Congress.¹⁶⁸ Although assignments are generally prohibited, there are several important exceptions. The exceptions consist of assignments to "a bank, trust company, or other financing institution, including any Federal lending agency," unless the contract forbids such assignments. Unless expressly eliminated by the contract, there are certain limitations: the assignment must cover "all amounts payable" not already paid; may not be made to more than one person; and the contract proceeds are not subject to further assignment. Once made, written notice of the assignment and a copy must be filed with three entities, namely the contracting office, the surety on the bond, and the disbursing officer, if any, designated in the contract to make payment.¹⁶⁹

¹⁶⁷ See *United States ex rel. W.R. Vaught Co. v. F.D. Rich Co., Inc.*, 439 F.2d 895, 905 (8th Cir. 1971)(pre-judgment interest as authorized under Missouri law becomes part of amount "justly due" Miller Act claimants).

¹⁶⁸ See 41 U.S.C. § 15 (1982).

¹⁶⁹ *Id.*

On the state level in Mississippi, there is no statute pertaining to assignments of the proceeds from public works contracts. On private construction work, however, a statute provides that no contractor may assign the contract proceeds to the prejudice of subcontractors, laborers, or materialmen unless the contractor enters into a solvent bond¹⁷⁰ as provided for in another statute.¹⁷¹ In Mississippi, it has been held that a construction contract may prohibit assignments allowing an owner to decline to honor an assignment made contrary to such a contract prohibition.¹⁷² However, contractual prohibitions against assignments in construction contracts are not effective to prevent an assignment for the purpose of creating a security interest for a debt since such prohibitions are invalidated by the Mississippi Uniform Commercial Code. This is true of assignments of money either due or to become due as progress payments for work either already performed or yet to be performed.¹⁷³

The litigation in this area revolves around the question of who is entitled to the balance of the contract funds remaining unpaid on a default by the contractor. The contest may be between the assignee and the owner, the assignee and the surety on the construction bond, or the assignee and other creditors or representatives of other creditors such as receivers or trustees in bankruptcy. So numerous are the questions presented by such contests that the limitations of space will not permit exhaustive treatment in this article. Accordingly, only a few points will be mentioned.

In a contest between the owner and the assignee, the owner retains the right of set-off, unless waived. The rights of the assignee can rise no higher than the rights which could have been asserted by the contractor.¹⁷⁴ In a contest between the assignee

¹⁷⁰ MISS. CODE ANN. § 85-7-183 (1972).

¹⁷¹ *Id.* § 85-7-185 (1972).

¹⁷² See *Merchants & Farmers Bank v. McClendon*, 220 So. 2d 815, 821 (Miss. 1969).

¹⁷³ See *Mississippi Bank v. Nickles & Wells Constr. Co.*, 421 So. 2d 1056, 1060 (Miss. 1982)(contractual prohibition against assignment ineffective where subcontractor made assignment to bank of right to payment for purpose of creating security interest, overruling *Frazier v. National Elec. Supply Co., Inc.*, 362 So. 2d 609 (Miss. 1978)).

¹⁷⁴ *Royal Indem. Co. v. United States*, 371 F.2d 462 (U.S. Ct. Cl. 1967), *cert. denied*, 389 U.S. 833 (1967).

and the surety on the construction bond, the surety always prevails as to the "final retainage" and in most jurisdictions as to the "progress estimates"¹⁷⁵ on the theory that the surety is subrogated to the rights of the owner, as well as to the rights of the contractor and the suppliers whose claims are paid by the surety. The subrogation relates back to the date of the execution of the construction contract.¹⁷⁶

However, Mississippi has long followed the minority rule which provides that although the surety is to be given priority as to final retainage, the assignee comes first as to progress payments earned prior to the contractor's default,¹⁷⁷ at least where it appears that the funds advanced were used to pay for items related to the performance of the work. Mississippi case law furnishes no clear guide as to when a "default" occurs within the rules fixing priority.

Since the enactment of the Uniform Commercial Code, priorities as among assignees may depend upon compliance with the filing requirements of the Code. However, the subrogation of the surety as to the final retainage is not within the provisions of the Uniform Commercial Code and priority does not depend upon the filing of a financing statement.¹⁷⁸ Compliance with the Uniform Commercial Code may be necessary only where the surety relies upon an assignment and seeks to recover a contract balance on one contract to reimburse its loss on another contract.¹⁷⁹

¹⁷⁵ See *National Shawmut Bank v. New Amsterdam Casualty Co.*, 411 F.2d 843, 848 (1st Cir. 1969)(completing surety has right to earned but unpaid progress payments while assignee's rights are subject to dominant rights of owner to recoup damages suffered by default).

¹⁷⁶ *Id.* at 848-49.

¹⁷⁷ See *Reliance Ins. Co. v. First Miss. Nat'l Bank*, 263 So. 2d 555, 558-59 (Miss. 1972)(assignee has superior rights to progress payments while surety receives final retainage).

¹⁷⁸ See *National Shawmut Bank v. New Amsterdam Casualty Co.*, 411 F.2d 843, 848 (1st Cir. 1969)(surety entitled to recover payments although contractor had not filed financial statement); *Travelers Indem. Co. v. Clark*, 254 So. 2d 741, 747 (Miss. 1971)(proceeds from assignment in bond application not subject to filing provisions of Uniform Commercial Code).

¹⁷⁹ See U.C.C. § 9-302 (1978); see also *Travelers Indem. Co. v. Clark*, 254 So. 2d 741, 747 (Miss. 1971)(when surety seeks to use assignment to reach security interest in another contract, assignment becomes financing transaction subject to filing requirements

Loans to a contractor are not within the coverage of a bond which is conditioned for the payment of claims for labor and material. This strict rule applies even where it can be shown that the proceeds of the loan were used to meet payrolls on the bonded project or to pay for materials for which the bond is liable.¹⁸⁰

On Federal contracts, failure to comply with the Act of Congress¹⁸¹ renders the assignment void as to the United States. Such failure does not, however, render the assignment void as between the parties to the assignment.¹⁸² In a contest among claimants for the funds in which the United States has no interest, the rights of the contestants are governed by the local law.¹⁸³ Entitlement to the assigned fund in the hands of a trustee in bankruptcy is governed by the same rules.¹⁸⁴

X. EFFECT OF GENERAL ACT ON HIGHWAY CONTRACTS

The general statute relating to bonds on public works does not supersede the existing statutory provisions which specifically deal with contracts on behalf of the State Highway Commission.

of Uniform Commercial Code).

¹⁸⁰ See *Hancock Bank v. G.E. Bass & Co.*, 154 So. 2d 278, 279 (Miss. 1963)(surety not liable for funds advanced to subcontractor which were used for labor and materials); *City Coal & Lumber Co. v. Gulf Ref. Co.*, 184 Miss. 260, 265-66, 185 So. 250, 251 (1938)(advancement of money to be used to pay laborers does not constitute furnishing labor so as to be covered by bond); *Oliver Constr. Co. v. Crawford*, 142 Miss. 490, 500-01, 107 So. 877, 879 (1926)(contractor's bond not liable for money loaned to subcontractor which is used in paying for material and labor).

¹⁸¹ 41 U.S.C. § 15 (1982).

¹⁸² See *Martin v. National Sur. Co.*, 300 U.S. 588, 594 (1937)(noncompliance with statutory conditions of valid assignment of claim against United States does not prevent equity of surety to secure payment of laborers and materialmen); *Segal v. Rochelle*, 336 F.2d 298, 302 (5th Cir. 1964)(assignment of claim or right against United States is enforceable between parties to assignment); *Mayo v. Pioneer Bank & Trust Co.*, 270 F.2d 823, 834 (5th Cir. 1959)(where government no longer has vital interest, assignment is good between parties or successors in spite of fact that government was not given notice of assignment).

¹⁸³ See *Freeman v. Ritner*, 489 F.2d 431, 433 (9th Cir. 1973)(assignability of right depends on local law); *Danning v. Mintz*, 367 F.2d 304, 308 (9th Cir. 1966)(validity of assignment is determined by law of state in which transfer takes place); *In re Italian Cook Oil Corp.*, 190 F.2d 994, 997 (3d Cir. 1951)(state law presumed to determined effectiveness of assignment).

¹⁸⁴ See *Freeman v. Ritner*, 489 F.2d 431, 434 (9th Cir. 1973)(local law as to validity of assignment applies where assigned funds are held by trustee in bankruptcy).

Nor does the new statute abrogate or prohibit the insertion by the Highway Department of conditions in the bond which exceed those required by the statutes.¹⁸⁵ Therefore, the minimum conditions heretofore included in highway bonds will not be affected by the new statute. However, the general statutes apply to highway bonds whenever the provisions of the general statute are not inconsistent with the statutes relating specifically to highway contracts.

Several provisions of the general statutes as enacted and made effective April 1, 1981 will apply to highway contracts.¹⁸⁶ These include:

1. Limitations of coverage to exclude remote suppliers such as those who supply material to sub-subcontractors;¹⁸⁷

2. The right of suppliers to sue on the bond after the lapse of ninety days from the date on which the last claimed item is supplied, subject to contractual conditions;¹⁸⁸

3. The one-year bar against maintaining an action on the bond if the suit is not filed within one year after publication by the owner of final settlement or abandonment;¹⁸⁹

4. The condition requiring a written notice within ninety days as applied to claims by those having no direct contractual relationship with the bonded contractor.¹⁹⁰

These provisions have been discussed throughout this article and the discussion will not be repeated here.

XI. THIRD PARTY BENEFICIARIES—TORT CLAIMANTS EXCLUDED

Contract "payment" and "performance" bonds, whether combined in one document or cast in separate ones, have the same named obligee, namely the project owner, but the intended beneficiaries are different. The performance bond is primarily

¹⁸⁵ See *Andrews v. Waste Control, Inc.*, 409 So. 2d 707, 713 (Miss. 1982)(when different code sections deal with same subject matter, these sections are to be construed and interpreted not only so they harmonize with each other but also so they fit into general and dominant policy of particular system of which they are part).

¹⁸⁶ Miss. CODE ANN. §§ 31-5-51 -31-5-57 (Supp. 1984).

¹⁸⁷ *Id.* § 31-5-51(4) (Supp. 1984).

¹⁸⁸ *Id.* § 31-5-51(2) (Supp. 1984).

¹⁸⁹ *Id.* § 31-5-53 (Supp. 1984).

¹⁹⁰ *Id.* § 31-5-51(3)(Supp. 1984).

designed to secure the owner's right to the full and faithful performance of the underlying construction contract. The payment bond is primarily designed to secure payment to those who supply labor and material or other items furnished for or used in the performance of the contract work. The owner's interest in the payment bond is to see that the bonded contractor has available to him sufficient credit to allow for the unimpeded flow of performance and the ultimate completion of the work under contract.

However, neither type of bond extends to secure third parties who are not suppliers or subcontractors of the bonded contractor against damages resulting from alleged torts arising out of the negligent performance or nonperformance of the contract of construction.¹⁹¹ The bonds are not designed to extend coverage to operate as an all-risks policy of public liability insurance.¹⁹²

CONCLUSION

Construction bond claims by third-party beneficiaries are

¹⁹¹ See *Tri-State Ins. Co. v. United States*, 340 F.2d 542, 546 (8th Cir. 1965)(surety not liable beyond terms of its bond where contractor fully complied with architect's instructions causing removal of lateral support of adjoining landowner); *Continental Ins. Co. v. Harrison County*, 153 F.2d 671, 676 (5th Cir. 1946)(county not liable to owner of barges being rented by county to support falling bridge when contractor's negligent use of dynamite damaged barges); *National Sur. Co. v. Ulmen*, 68 F.2d 330, 333 (9th Cir. 1933)(surety not liable to pay judgment against contractor in favor of driver of automobile who hit culvert along highway under construction, notwithstanding contractor's failure to maintain danger and warning signals as required by contract), *cert. denied*, 292 U.S. 624 (1934); *Water Works, Gas & Sewer Bd. v. Buchanan Contracting Co.*, 318 So. 2d 267, 269 (Ala. 1975)(public works bond surety not liable to third parties for injuries caused by negligence of contractor principal when gas pipe exploded); *Redditt v. Wall*, 55 So. 45, 46 (Miss. 1911)(county road contractor's bond securing "prompt, proper, and efficient performance" of contractor does not secure against negligent injury to traveler); *Roper Lumber Co. v. Lawson*, 195 N.C. 840, 143 S.E. 847, 849 (1928)(highway contractor's surety not liable for damages resulting from fire negligently set by contractor or employees).

¹⁹² See *Tri-State Ins. Co. v. United States*, 340 F.2d 542, 545-46 (8th Cir. 1965)(bond does not specify that its coverage is to operate as all risks policy of public liability insurance for benefit of tort claimants); *Poole v. Brunt*, 338 So. 2d 991, 995 (Miss. 1976)(surety on sheriff's bond is not liable for negligent acts resulting in automobile accident committed by deputy sheriff while en route to investigate or to perform law enforcement function).

largely the creature of statutes, both federal and state. Usually, these statutes, being in derogation of the common law, must be carefully and strictly followed, because, in many respects, they chart a jurisdictional course which allows few, if any, deviations founded upon reason or logic, and an unauthorized detour may prove to be a dead end. The base line is that it is of prime importance to carefully review the statutes and to strictly follow their chartered course and to leave nothing undone which the statutes require. The well-worn path of bond litigation is cluttered with the mistakes of those who have failed to heed this caveat. Many of those mistakes derive from a failure to distinguish among the rules governing the different types of bonds. This article strives to be of help in avoiding such mistakes in the future.

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The chief cause of problems is solutions.

—Eric Sevareid

I. INTRODUCTION

In less than a year, the Mississippi Supreme Court issued several major opinions¹ which greatly affected the law of bad faith in Mississippi.² One of these opinions, *Bankers Life & Casualty Co. v. Crenshaw*,³ however, casts doubt on some of the principles which the court had established only months before. Nonetheless, the court has rebounded from *Bankers Life* and, as will be seen, has quickly returned to the principles established just prior to that case.

The repeated attempts to provide workable standards in bad faith law in Mississippi have resulted in much confusion and uncertainty. By March 1986, however, the court once again appeared to be headed toward a consistent policy concerning trial procedure in bad faith cases. This comment deals with three primary areas of Mississippi insurance bad faith law: (1) the nature of the arguable reason to deny payment;

¹ Mississippi Farm Bureau Mut. Ins. Co. v. Todd, No. 54,698 (Miss. Mar. 5, 1986); Southern United Life Ins. Co. v. Caves, 481 So. 2d 764 (Miss. 1985); National Life & Accident Ins. Co. v. Miller, No. 54,702 (Miss. Nov. 13, 1985); Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985)(en banc); State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242 (Miss. 1985); Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833 (Miss. 1984)(en banc).

² For an historical discussion of Mississippi bad faith law through the early 1980's, see generally Freeland and Freeland, *Bad Faith Litigation: A Practical Analysis*, 53 Miss. L. J. 237 (1983) and W. DENTON & W. WALKER, *BAD FAITH LITIGATION IN MISSISSIPPI* (1981).

³ 483 So. 2d 254 (Miss. 1985).

(2) the test for, and permissible extent of, punitive damages in insurance cases; and (3) the trial procedure to be employed in a bad faith case.

II. BAD FAITH IN MISSISSIPPI

A. *The Pre-Bad Faith Rule*

Until well into the 1970's, recovery of punitive damages in Mississippi against insurance companies was governed by the same rules applicable to punitive damages in other contract cases. The rule of punitive damages in contract cases dated back to the case of *Hood v. Moffett*,⁴ in which the Mississippi Supreme Court held that punitive damages in contract cases were available when "the act or omission constituting the breach of the contract also amounts to the commission of a tort."⁵ Later, in *American Railway Express Co. v. Bailey*,⁶ the court restated the rule in somewhat different terms, requiring that the breach of contract be "attended by some intentional wrong, insult, abuse, or gross negligence, which amounts to an independent tort."⁷ The "attended by" language continued to be the rule in Mississippi for half a century⁸ and was cited in cases involving insurance contracts.⁹

In a possible precursor to a workable application of the rule to insurance contracts, the court, in *Lincoln National Life Insurance Co. v. Crews*,¹⁰ applied the traditional rule in reversing an award of puni-

⁴ 109 Miss. 757, 69 So. 664 (1915).

⁵ 109 Miss. at 767, 69 So. at 666.

⁶ 142 Miss. 622, 107 So. at 763 (1926).

⁷ 142 Miss. at 631, 107 So. at 763 (emphasis added). In *Bailey*, although the court found the company negligent, there was no evidence of "any intentional or willful wrong, or gross negligence, which amounts to the commission of a tort." *Id.* at 631, 107 So. at 763.

⁸ See, e.g., *Lincoln Nat'l Life Ins. Co. v. Crews*, 341 So. 2d 1321, 1322 (Miss. 1977)(where court found that "good faith" defense by insurance company, based on policy provisions, precluded the award of punitive damages); *D. L. Fair Lumber Co. v. Weems*, 196 Miss. 201, 221-22, 16 So. 2d 770, 773 (1944)(where contractual duty was breached and breach was attended by willful destruction of another's fence, court found justification for punitive damages); see also *S. Discount Corp. v. St. Paul Fire & Marine Ins. Co.*, 368 F. Supp. 1378, 1381 (S. D. Miss. 1974)(punitive damages and attorneys' fees denied where insurer unsuccessfully argued it could either rebuild or replace fire-damaged building rather than pay face amount of policies). Similarly, prejudgment interest and attorneys' fees were not awarded where the insurer's initial refusal to pay was not frivolous. *Cherokee Ins. Co. v. Ellis*, 424 F. Supp. 102, 103-04 (S.D. Miss. 1976).

⁹ E.g., *Progressive Casualty Ins. Co. v. Keys*, 317 So. 2d 396, 398 (Miss. 1976)(citing cases).

¹⁰ 341 So. 2d 1321 (Miss. 1977).

tive damages against an insurance company.¹¹ Perhaps more importantly, however, the court noted that the insurer defended the suit by relying on the provisions of the policy and that nothing indicated that the company acted any way "other than in good faith."¹² The good faith/bad faith distinction soon found its place in Mississippi law.¹³

B. *The Insurance Contract and Punitive Damages*

The Mississippi Supreme Court finally approved an award of punitive damages against an insurance company, while at the same time introducing some new language for dealing with breaches of insurance contracts, in *Standard Life Insurance Co. v. Veal*.¹⁴ In *Veal*, the company refused to pay on a credit life policy issued to a finance company to insure the debt of the obligor, Mr. Veal.¹⁵ The policy insured Mr. and Mrs. Veal and the company was sued by Mr. Veal after it declined to pay proceeds upon the death of Mrs. Veal. The company stated that because Mrs. Veal's name did not appear on the debt instrument, she had no insurable interest and there was no debtor-creditor relationship with respect to her.¹⁶ At trial, the company defended on the grounds

¹¹ *Id.* at 1322.

¹² *Id.* The court further stated that the mere fact that the company rejected the claim and later lost did not justify punitive damages. *Id.* This principle is now expressly applied in insurance cases. *See, e.g., Peel v. American Fidelity Assurance Co.*, 680 F.2d 374, 376 (5th Cir. 1982)(fact that insured is ultimately found covered, or covered for more than insurer admits, does not, standing alone, justify punitive damages).

¹³ For a discussion of good faith versus bad faith and the consequences of each, see generally Freeland and Freeland, *supra* note 2, and W. DENTON & W. WALKER, *supra* note 2. The obvious consequence of bad faith conduct, of course, is punitive damages, which are imposed to punish the defendant, to make him an example to deter others from similar conduct, and to reward the plaintiff for performing a public service in "bringing the wrongdoer to account." *Bankers Life*, 483 So. 2d at 268-69.

¹⁴ 354 So. 2d 239 (Miss. 1977). The *Veal* principle was subsequently applied by the court in suits for intentional torts of workers' compensation insurance carriers. *Southern Farm Bureau Casualty Ins. Co. v. Holland*, 469 So. 2d 55, 58-59 (Miss. 1984). In *Holland*, the court held that the exclusivity provision of the Mississippi Workers' Compensation Act, Miss. CODE ANN. § 71-3-9 (1972), "does not bar an action by the employee against the insurance carrier for the commission of an independent tort." *Holland*, 469 So. 2d at 59. The court also noted that the Act's penalty provisions (§ 71-3-37(5) and (6)) were intended to redress negligent nonpayment, and therefore were "inadequate to deter intentional wrongdoing by the carrier." *Holland*, 469 So. 2d at 58. *Holland* left undisturbed the prior ruling by the court, in *Taylor v. U.S. Fidelity & Guar. Co.*, 420 So. 2d 564 (Miss. 1982), that the Act's exclusivity provision *did* bar an action against a workers' compensation carrier for *negligent* refusal to pay. *Holland*, 469 So. 2d at 56-57.

¹⁵ *Veal*, 354 So. 2d at 241.

¹⁶ *Id.* at 242-43. This was the reason the company gave, before suit, for the denial of the claim. *Id.* at 242-43.

that Mr. Veal had no right to sue because he was not a beneficiary and because no premium had been paid on the life of Mrs. Veal.¹⁷ The court found that Mr. Veal had a beneficial interest in the proceeds of the policy and since similar suits were permitted in the mortgagor-mortgagee context, the rule "should be extended to the debtor-creditor relationship involved in this case."¹⁸ The policy was for the "mutual benefit" of Mr. Veal and the creditor, and Mr. Veal's interest was "more than an incidental benefit."¹⁹

Furthermore, the court noted that the policy defined "insured obligor" so as to include the signatory's spouse, and it was not required that the spouse sign the debt contract.²⁰ Thus, the *original* reason given by the defendant upon its refusal to pay was without "any foundation" and, in fact, was not argued on appeal.²¹

After dispensing with the insurer's contentions, the court stated:

This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legiti-

¹⁷ *Id.* at 243.

¹⁸ *Id.* at 244.

¹⁹ *Id.* at 245. Apparently, the court found that the defendant insurer should have reasoned that the rule would be applicable here. Otherwise, it could be argued as inequitable to hold an insurer liable for punitive damages where the liability on the contract was premised upon a rule drawn from another context and was being extended to the situation in the case at bar. *Cf. Gulf Guar. Life Ins. Co. v. Kelley*, 389 So. 2d 920, 923 (Miss. 1980)(no bad faith where insurer litigated case of first impression).

²⁰ *Veal*, 354 So. 2d at 248.

²¹ *Id.* The *Veal* case was heard by a three-judge panel. *Id.* at 240. When the opinion was issued, three judges concurred with the court's opinion, written by Justice Sugg, one justice did not participate in the case, and four justices dissented. *Id.* at 249. Justice Smith, writing for the dissenters, noted that the company relied on the advice of counsel in rejecting the claim and that this alone, he felt, protected the defendant from a punitive damages claim. *Id.* at 251 (Smith, J., dissenting). Justice Smith further felt that "[i]n no event should the mere declination to pay a debt" result in punitive damages. *Id.* The dissenters also feared that the decision would result in defendants being "chilled" from exercising their constitutional rights to defend a suit. "This has never been the law in Mississippi and should never be." *Id.* Justice Smith's point concerning the advice of counsel question may be an overstated fear. Mississippi has recognized advice of counsel as a defense to punitive damages in certain actions, and there is no reason to believe that it would be unavailable to insurance companies. The majority opinion did not discuss advice of counsel because, apparently, it was not shown by the defendant company. For a discussion of the advice of counsel defense in punitive damages actions against insurance companies, see Freeland and Freeland, *supra* note 2, at 250-56 (advocating that good faith reliance on counsel be complete defense to punitive damages claims), and *Bankers Life*, 483 So. 2d at 297 (Robertson, J., dissenting with two other justices)(where three Mississippi Supreme Court justices "doubt" that court would uphold assessment of punitive damages where insurer acted upon erroneous advice of counsel).

mate claim, and bases its refusal to honor the claim on a reason clearly contrary to the express provisions of its own policy. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely. We are of the opinion that the refusal to pay the legitimate claim in this case was an intentional wrong and constituted an independent tort. . . .²²

The court went on to find that \$25,000 in punitive damages on a \$1,008 contract claim was not excessive in light of the defendant's assets, which exceeded \$85 million.²³

Therefore, the court did not require that the nonpayment be attended by a separate act, tortious in nature, but instead found the refusal to pay itself constituted an "intentional wrong" amounting to an "independent tort."²⁴ The test after *Veal* was whether the refusal to pay was based on a "legitimate reason or an arguable reason."²⁵

1. The Elusive "Arguable Reason"

The *Veal* decision set the stage for a case-by-case determination of whether reasons for nonpayment were arguable and thus protected the company from punitive damages. The court has, however, established a few clear-cut rules on what will and will not qualify as arguable reasons. It is clear, for instance, that an insurance company will not be liable for punitive damages if it is guilty of mere negligence;²⁶ or if the

²² *Veal*, 354 So. 2d at 248.

²³ *Id.* at 240, 249.

²⁴ *Id.* at 248. The dissent would not have held the refusal to pay as itself the "distinct and separate tort," as the dissenters felt the court's view was contrary to Mississippi law. *Id.* at 251 (Smith, J., dissenting with three other justices). The fact that the refusal itself could constitute an independent tort was immediately recognized by the federal courts applying Mississippi law in diversity cases. *E.g.*, *Black v. Fidelity Guar. Ins. Underwriters*, 582 F.2d 984 (5th Cir. 1978); *Michael v. National Sec. Fire & Casualty Co.*, 458 F. Supp. 123 (N.D. Miss. 1978).

²⁵ *Veal*, 354 So. 2d at 248.

²⁶ *E.g.*, *Bellefonte Ins. Co. v. Griffin*, 358 So. 2d 387, 391 (Miss. 1978) (negligent failure to investigate not basis for punitive damages). Of course, in certain situations, it may be necessary to determine if a company has crossed the line from mere or simple negli-

nonpayment or underpayment is a result of a clerical error;²⁷ or if the insured and the insurer are engaged in a "legitimate pocketbook dispute;"²⁸ or if the insured has allegedly failed to meet a policy condition;²⁹ or if a genuine question existed as to coverage;³⁰ or if an insurer

gence to gross negligence. Furthermore, although certain acts, such as negligence, are not actually "arguable reasons," they are not the kinds of conduct which justify punitive damages. See *infra* notes 141-44 and accompanying text.

²⁷ Consolidated Am. Life Ins. Co. v. Toche, 410 So. 2d 1303, 1306 (Miss. 1982) ("clerical error or honest mistake" by insurer, resulting in underpayment of \$29.71 per month under credit disability policy, did not warrant imposition of punitive damages).

²⁸ State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So. 2d 321, 322 (Miss. 1980). In *Roberts*, the court reversed an award of actual and punitive damages against the insurance company. *Id.* at 322. The dispute concerned the amount due the insured from State Farm after Mr. Roberts' automobile was demolished in an accident. *Id.* at 321. Mr. Roberts demanded payment in the amount he owed to the bank on the car loan; the insurer, noting the policy insured the actual cash value of the automobile (which was about \$1,000 less than the amount owed the bank), refused to pay the amount demanded. *Id.* at 321-22. At trial, Mr. Roberts was awarded actual damages and \$20,000 in punitive damages. *Id.* at 321. The supreme court reversed both awards, observing as follows:

[T]he trial court erred in granting the punitive damages instruction. A search of the record reveals nothing other than a legitimate pocketbook dispute . . . as to the amount due for the demolished automobile, one claiming the sum owed the bank on the automobile and the other admitting coverage in the amount of its policy, specifically, the actual cash value of the automobile. In our judgment, these differences of opinion did not rise to the level of wanton, gross or intentional conduct in the nature of an independent tort. In the absence of such conduct, a punitive damages award cannot stand.

Id. at 322. The court remanded the case for an award of the actual cash value of the automobile. *Id.*; see also *Henderson v. U.S. Fidelity & Guar. Co.*, 620 F.2d 530, 536 (5th Cir. 1980) (punitive damages precluded where the insurer "honestly contests the amount of damages"), *cert. denied*, 449 U.S. 1034; *Progressive Casualty Ins. Co. v. Keys*, 317 So. 2d 396, 397-98 (Miss. 1975) (no punitive damages where testimony in conflict as to value of insured's automobile at time of accident).

²⁹ *Henderson v. U.S. Fidelity & Guar. Co.*, 620 F.2d 530, 536 (5th Cir. 1980); see *New Hampshire Ins. Co. v. Smith*, 357 So. 2d 119, 121 (Miss. 1978) (trial court erred in refusing insurer's request for peremptory instruction on punitive damages issue where insured failed to furnish medical reports or authorization as required by policy).

In *Crews*, 341 So. 2d 1321, the court affirmed an award of actual damages but reversed an award of punitive damages against the insurer. *Id.* at 1322. The court noted that the company defended on the grounds that the insured failed to comply with the time limits for submitting proof of loss. Contract liability was nonetheless affirmed because a jury issue was created on the question of whether the company had waived the time limit. *Id.* However, in reversing the punitive damages instruction, the court stated: "There is nothing in the record capable of supporting a finding that Lincoln, in defending the suit and relying upon provisions of the policy, acted other than in good faith." *Id.*

³⁰ *Patton v. Aetna Ins. Co.*, 595 F. Supp. 533, 536 (N.D. Miss. 1984) (dispute over whether coverage had begun); *Aetna Casualty & Sur. Co. v. Steele*, 373 So. 2d 797, 801-02 (Miss. 1979).

litigates a case of first impression.³¹ And, to state the obvious, an insurer is not liable for punitive damages when it prevails on the contract claim.³² Furthermore, even after *Veal*, the court continued to state that punitive damages would be allowed "only with caution and within narrow limits."³³

The first award of punitive damages to be affirmed by the Mississippi Supreme Court after *Veal* involved a fire insurance policy in *Travelers Indemnity Co. v. Wetherbee*.³⁴ After a fire to the insured's home, the insurer learned that the insured was a suspect in the fire marshal's investigation.³⁵ The company not only refused to pay for damage to the house, but also on the contents coverage, because the company wanted to settle the entire claim at once.³⁶ The contents cov-

³¹ *Michael v. National Sec. Fire & Casualty Co.*, 458 F. Supp. 128, 131-32 (N.D. Miss. 1978); *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So. 2d 920, 923 (Miss. 1980)(en banc). In *Kelley*, the decedent Mr. Kelley was insured under a credit life policy issued by the defendant insurer. *Id.* at 921. The policy was issued to cover a loan made to Mr. Kelley for the purchase of an automobile. *Id.* The master policy issued to the creditor provided that the company could, within 90 days of the issuance of the certificate of insurance to the borrower, cancel the life policy five days after written notice has been mailed to the creditor. *Id.* Within the 90-day period, the insurer learned that Mr. Kelley had suffered a heart attack, and the policy was promptly canceled. *Id.* Mr. Kelley died shortly thereafter, and Mrs. Kelley filed suit. *Id.* The trial court directed a verdict for the plaintiff on the contract claim and submitted the issue of punitive damages to the jury, which resulted in a \$35,000 punitive award. *Id.* While noting that ordinarily the insurer would have the absolute right to cancel, under this fact situation the Mississippi Supreme Court held the insurer estopped from exercising this right due to considerations of public policy. *Id.* at 922. Thus, the directed verdict on the contract claim was proper. *Id.* However, the court concluded that, since this case was the first time the court had addressed the policy provision relied on by Gulf, punitive damages were not proper. *Id.* at 923. "Defendant had the right to interpose its defense, and although we have decided defendant was liable on its policy, we conclude there was an arguable reason for failing to pay the claim. . . ." *Id.* Consequently, the court held the insurer was entitled to a peremptory instruction on the punitive damages claim.

³² *O'Malley v. U.S. Fidelity and Guar. Co.*, 602 F. Supp. 56, 59 (S.D. Miss. 1985); *Aitken v. State Farm Mut. Auto. Ins. Co.*, 404 So. 2d 1040, 1045 (Miss. 1981). Also, an insurance company cannot be liable for punitive damages merely because it defended, rather than settled, a claim and lost. *Crews*, 341 So. 2d at 1322.

³³ *Consolidated Am. Life Ins. Co. v. Toche*, 410 So. 2d 1303, 1304-05 (Miss. 1982).

³⁴ 368 So. 2d 829 (Miss. 1979).

³⁵ *Id.* at 830.

³⁶ *Id.* at 830-32. The record showed that the defendant company was aware of the difficult financial status of the insured. *Id.* at 831. The court noted the unequal bargaining position of the parties, but pointed out that the "opportunity for economic pressure does not imply the fact" that the defendants engaged in wrongful conduct. *Id.* at 833. Nonetheless, the court later stated it could find no other reason for failure to pay contents coverage than the motive of "economic gain." *Id.* at 835.

erage was undisputed, but payment for the contents was not made until more than eight months after the insured was exonerated by the fire marshal.³⁷ The Mississippi Supreme Court affirmed punitive damages because it was clear under Mississippi law that the different policy coverages were considered separate contracts, and the insurer had no reason to refuse prompt payment for contents after the insured was absolved of responsibility for the fire.³⁸ *Wetherbee* and other cases³⁹ thus establish that a company policy to settle entire claims at once is not an arguable reason to refuse to pay a claim when that claim is based on a policy provision which is deemed to be a severable contract.

An insurance company is also running the risk of punitive damages if it denies payment in reliance on a policy provision which has already been invalidated by judicial decision. In *Richards v. Allstate Insurance Co.*,⁴⁰ the Fifth Circuit Court of Appeals affirmed an award of punitive damages. Allstate had retained a policy provision which had been held unenforceable as against public policy by the Mississippi Supreme Court in an earlier case.⁴¹ Allstate, rather than delete the provision, informed claims personnel that no claims should be denied based on the invalid provision.⁴² The failure of this procedure resulted

³⁷ *Id.* at 834. The court noted that the company was reasonable in withholding payments during the arson investigation, but that even when the insured was cleared, the company had refused to pay for the destroyed contents despite "repeated demands." *Id.* at 834-35.

³⁸ *Id.* at 834-35.

³⁹ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Bishop*, 329 So. 2d 670, 673 (Miss. 1976)(insurer's refusal to settle under one automobile insurance policy unless insured agreed to simultaneously settle claim under second policy was "arbitrary"; no punitive damages sought, but interest charged to insurer).

⁴⁰ 693 F.2d 502 (5th Cir. 1982); see also *Bankers Life*, 483 So. 2d 254 (Miss. 1985). In *Bankers Life*, the majority affirmed a punitive damages award after the company had denied a claim under a group insurance policy. The majority found that the company denied the claim because it contended that the plaintiff's limb amputation was forced by a preexisting disease and not by an injury "directly and independently of all other causes." *Id.* at 270-71. The court noted that, under Mississippi law, recovery may be had if the injury "played any part" in the limb loss. *Id.* Since the court said the company denied the claim because the injury was not the sole cause of the amputation, *Bankers Life* acted contrary to Mississippi law and was thus liable for punitive damages. *Id.* In a strong dissent, Justice Robertson contended the company denied the claim because it believed that the limb loss was occasioned *solely* by the preexisting disease. *Id.* at 282-83 (Robertson, J., dissenting). Since the company's position, as seen by Justice Robertson, was that the injury played no part in the limb loss, the denial was not based on an invalid policy provision and was not contrary to Mississippi law. See *id.*

⁴¹ *Allstate*, 693 F.2d at 504. The provision was invalidated in *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So.2d 767 (Miss. 1973).

⁴² *Allstate*, 693 F.2d at 504.

in a denial based on the provision and, consequently, the federal court imputed to the insurance company a corporate policy not to inform policyholders of certain legal requirements.⁴³

A plaintiff also succeeded in his quest for punitive damages in *Reserve Life Insurance Co. v. McGee*.⁴⁴ Mr. McGee applied for and was issued a hospitalization insurance policy.⁴⁵ When he later was hospitalized and filed a claim under the policy, the company refused on the grounds that Mr. McGee had made materially false statements on the application; specifically, the company contended he failed to inform it of a preexisting condition which would have affected the company's acceptance of the risk.⁴⁶ However, the court stated that it was undisputed that the condition which Mr. McGee failed to disclose had nothing to do with the condition for which he was claiming benefits.⁴⁷ Further, the company had received permission to obtain Mr. McGee's medical records and the McGees had been told that this would be done.⁴⁸ The investigation into Mr. McGee's medical history was not initiated until *after* the claim was filed.⁴⁹ Under these facts, the court said a "clear question" for the jury was presented as to whether the reason for denial was legitimate.⁵⁰ The jury found no arguable reason, and the court affirmed.⁵¹

⁴³ *Id.* at 505. The question of whether this conduct justified punitive damages was held to be for the jury. *Id.*

⁴⁴ 444 So. 2d 803 (Miss. 1983).

⁴⁵ *Id.* at 804-05.

⁴⁶ *Id.* at 805. The company also argued that the application for insurance recited the applicant's health as "excellent." *Id.* at 807. However, the court noted that the insurance agent admitted that Mr. McGee described his health as "good," and that it was the agent who had in fact written "excellent." *Id.*

⁴⁷ *Id.* at 807. Mr. McGee sought payments for hospitalization due to bladder problems, while the undisclosed illness was alleged to be transient ischemic attack. *Id.*

⁴⁸ *Id.* at 807.

⁴⁹ *Id.* at 805-06. Implicit in the court's affirmance of the award was criticism of this classic example of post-claims underwriting. Rather than exercising the right given by Mr. McGee to the company to check his medical history, Reserve Life sought a reason to deny after the claim was filed. The inequity of allowing a company to issue a policy and, after a claim is filed, to embark on a "fishing expedition" concerning matters which were easily discoverable at the time of application, is obvious. While the insurance companies may argue that it should be able to rely on the statements of the applicants, after *Reserve Life*, any company following such a policy denies a claim at its own peril.

⁵⁰ *Id.* at 809-10.

⁵¹ The court, or at least Justice Bowling, who authored the opinion in *Reserve Life*, appeared testy over the use of the term "bad faith." The opinion noted that the *Veal* decision had never mentioned those words. *Reserve Life*, 444 So. 2d at 807. The court also noted that the majority of "so-called 'bad faith' claims" had resulted in the finding of an arguable reason not to pay. *Id.* at 809. Regardless of the court's initial (six-year)

The court has recently made it crystal clear⁵² that an insurance company does not have an arguable reason, and cannot escape punitive damages, when it denies a claim based on facts known to the company's *agent* at the time the application for insurance is made.⁵³ This

reluctance to use the words "bad faith," it recognized the term in *Reserve Life* and continues to do so. *E.g.*, *Bankers Life*, 483 So. 2d 254 (Miss. 1985); *State Farm Fire & Casualty Co. v. Simpson*, 477 So. 2d 242 (Miss. 1985); *Blue Cross & Blue Shield v. Campbell*, 466 So. 2d 833, 841 (Miss. 1984)(en banc). Thus, the writers urging the court to adopt the phrase have been heard. See Freeland and Freeland, *supra* note 2, and W. DENTON & W. WALKER, *supra* note 2.

⁵² A rarity, indeed, in Mississippi's evolving law of bad faith.

⁵³ *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, No. 54,698, slip op. (Miss. Mar. 5, 1986); *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764 (Miss. 1985); *National Life & Accident Ins. Co. v. Miller*, No. 54,702 (Miss. Nov. 13, 1985). In *Todd*, the court affirmed a verdict against the insurer in the amount of \$25,000 actual and \$250,000 punitive damages. *Todd*, No. 54, 698, slip op. at 14. The Todds, after exercising an option to purchase a home, sought to obtain a FmHA loan for the purchase of the dwelling. *Id.* at 1. The loan was scheduled to be closed in late April, 1981, and in early April the Todds requested and received permission to begin moving personal items into the house; however, this permission was conditioned on the Todds' obtaining insurance coverage on the house. *Id.* at 1-2. Over a two-day span in mid-April, the Todds obtained a 30-day binder (listing Mrs. Todd as owner) from defendant Farm Bureau's agent and the vendors thereupon canceled the existing insurance on the house. *Id.* at 2. After these events, but before the loan was closed and title conveyed, a fire destroyed the house. *Id.* At the time of the fire, record title remained in the vendors, no note or deed of trust had been executed by the Todds, and neither the application nor the premium had been received by Farm Bureau. *Id.* A Farm Bureau investigative report in May, 1981, noted that, although the agent acted improperly he "did exactly what he intended"—that is, he bound coverage on the house. *Id.* at 4. The report opined that Farm Bureau "would be hard pressed to explain no coverage to a jury in Claiborne County." *Id.* Despite an opinion from the company's general counsel that the Todds may have had some insurable interest in the property, the company maintained that there was no insurable interest. *Id.* at 5, 30. After the company refused to pay, the vendors and the Todds filed suit against the company and the agent, alleging that the Todds were covered under the written binder and the vendors were covered by an oral binder given by the agent. *Id.* at 6. During the trial, the agent was nonsuited from the case. *Id.* at 7. At the close of testimony, the trial court directed a verdict for all plaintiffs on the contract claim. *Id.* at 10-12. The jury then returned a punitive damages verdict against Farm Bureau in the amount of \$250,000. *Id.* at 14. The supreme court held that the oral binder had been proven by "clear and convincing evidence," *id.* at 19-21, and further held that the policy amount was recoverable on the basis of the written binder, *id.* at 22-24. In deciding whether the punitive damages award was justified, the court held that, with respect to the oral binder issued to the vendors, the knowledge of the agent's acts were imputed to the company. *Id.* at 27. Thus, the company had no arguable reason for refusing to pay. *Id.* at 28. Further, based upon the written binder and evidence that the company realized the agent had bound the Todds, Farm Bureau had no arguable reason to refuse to pay the Todds, and a punitive damages instruction in their favor was proper. *Id.* at 28-29.

In *Caves*, an award of \$10,000 punitive damages was affirmed after the company

doctrine is supported by the familiar rule of agency that notice to the

refused to pay the proceeds of a credit life policy. *Caves*, 481 So. 2d at 770. Mr. Caves purchased an automobile and obtained at the same time a credit life policy through the bank loan officer, who was also an undisputed agent of the defendant insurer, Southern United. *Id.* at 765-66. The agent knew of a prior serious heart attack suffered by Mr. Caves eight years earlier. *Id.* at 765. The agent was under no direction to inquire into the health of prospective insureds even though the certificate stated that the insured must be in insurable health at the time of the policy was written. *Id.* at 766. Mr. Caves died within the month, before the first payment. *Id.* After engaging in some post-claims underwriting, the company denied coverage and refunded the premium. *Id.* The supreme court, citing the "general laws of agency" and Mississippi's statute defining an insurance agent, Miss. CODE ANN. § 83-17-1 (1972), stated that the agent's knowledge of Mr. Caves' preexisting condition was imputed to the company as a matter of law. *Caves*, 481 So.2d at 766-67. "The condition of insurability was effectively waived and the acts [of the agent] are binding upon the company." *Id.* at 767. Further, the court found that there was no evidence to show that Mr. Caves would have been denied coverage under Southern United's "regular underwriting methods." *Id.* Testimony indicated it was the "routine practice" of Southern United to accept the agent's recommendations of coverage without further inquiry. *Id.* at 767-68. By entrusting this broad discretion to the agent, and establishing no "clear and meaningful guidelines" for its agents, the company "manifests an intention to 'insure the world.'" *Id.* at 768. Thus, after the trial judge granted summary judgment to the plaintiff on the contract claim, the issue of punitive damages was properly submitted to the jury. *Id.* at 769.

In *Miller*, an award of \$350,000 in punitive damages, based on contract liability of \$2,500, was affirmed. *Miller*, No. 54,702, slip op. at 9, 19. The case centered around several irresponsible acts of two agents of National Life. While applying for a \$2,500 life insurance policy on her son, Mrs. Miller told the agents that the child had a heart murmur. *Id.* at 2. One of the agents, completing the applications from Mrs. Miller's answers, responded "No" to a question asking whether the applicant had been told of or treated for any "disease of the heart." *Id.* at 2. In response to a question as to whether any applicant had been hospitalized in the previous five years, the agent again recorded "No," although the other agent testified Mrs. Miller stated that the child indeed had been hospitalized during that period. *Id.* The child died approximately six months after the application was completed. *Id.* at 2,3. One agent subsequently told the insurer that the answers on the application accurately reflected the insured's statements, although the two agents discussed Mrs. Miller's *true* answers "four to five times." *Id.* at 3-4. The company denied the claim based on discovery of the child's congenital heart defect and the alleged false statements by the Millers. *Id.* at 3-4. At trial, one agent testified first that Mrs. Miller had told him of the child's prior hospitalization, but then, in later trial testimony, denied such statement had been made. *Id.* at 2,4. The agent further testified he "didn't put a lot of thought into" company inquiries about his knowledge. *Id.* at 5. The second agent, at trial, denied knowledge of the child's hospitalization, said he considered the heart murmur "insignificant," and admitted that he *never* told the home office that he was aware of the heart murmur or even that he was present at the taking of the application. *Id.* at 7. The company's district manager did admit that Mrs. Miller had at least told the agent about a "noise" in the child's heart, but that he never communicated this information to the claims department. *Id.* at 8. After recounting this not-so-funny comedy of errors, the supreme court noted there was no issue of fact as to disclosure of the heart murmur. *Id.* at 9. The court stated that the company could not escape

agent is imputed to the principal.⁵⁴

Outside of these situations, few hard and fast examples of "pure" arguable reasons or certain liability have developed. However, the courts have exercised great restraint in bad faith cases, and plaintiffs as a group have consequently met with infrequent success.⁵⁵

2. Effect of Medical Opinion on Insurer

Prior to 1985, in those medical cases in which the company has refused to pay, the existence of a competent medical opinion, upon which the company based its refusal, has operated to bar punitive damages.⁵⁶

However, the effect of the company relying on a doctor's opinion

liability by alleging the application did not disclose information given to the agents, and further, that such a claim was not an arguable reason to deny payment. *Id.* at 10. Then, citing Mississippi's agency statute, Miss. CODE ANN. § 83-17-1 (1972), the court rejected the claim that the company was not responsible for the knowledge of its two "soliciting agents." *Miller*, No. 54,702, slip. op. at 10-11. The court cited case law to reinforce the doctrine that the company is bound by notice to, or knowledge of, its agents. *Id.* at 11-12. The court concluded that the agents' "conscious decision not to disclose the truth," their failure to record the proper responses of Mrs. Miller, and their failure to bring their errors to the attention of the claims department all would justify a jury's finding that those actions "amounted to willfulness or such gross negligence as to amount to a reckless disregard of the Millers' rights." *Id.* at 14. Such actions warranted an instruction to the jury on the issue of punitive damages. *Id.* The fair-minded can only applaud the *Miller* decision, in light of the agents' astounding conduct.

⁵⁴ *E.g.*, *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764, 767 (Miss. 1985); RESTATEMENT (SECOND) OF AGENCY §§ 9, 268, 272 (1958).

⁵⁵ In support of this statement, it is noted that from 1977 through March 15, 1986, the Mississippi Supreme Court has affirmed only seven punitive damages awards against insurance companies: *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, No. 54,698 (Miss. Mar. 15, 1986); *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764 (Miss. 1985); *National Life & Accident Ins. Co. v. Miller*, No. 54,702 (Miss. Nov. 13, 1985); *Bankers Life*, 483 So. 2d 254; *Reserve Life*, 444 So. 2d 803; *Wetherbee*, 368 So. 2d 829; *Veal*, 354 So. 2d 293. The comment concentrates on Mississippi Supreme Court cases since the federal courts sitting in diversity jurisdiction are *Erie*-bound to follow Mississippi substantive law. *See Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 72-73, 78 (1937) (federal courts bound to apply substantive law of state in which federal court sits where diversity jurisdiction is invoked).

⁵⁶ *Peel v. American Fidelity Assurance Co.*, 680 F.2d 374, 376 (5th Cir. 1982)(no punitive damages where insurer based termination of disability benefits on physician's opinion that insured was no longer disabled; physician's opinion constituted an arguable reason as a matter of law to deny payment); *O'Connor v. Equitable Life Assurance Soc'y*, 592 F. Supp. 595, 597-98 (N.D. Miss. 1984)(punitive damages precluded where doctor's statement raised factual issue of disability); *Horton v. Hartford Life Ins. Co.*, 570 F. Supp. 1120, 1123-24 (N.D. Miss. 1983)(dispute between doctors as to whether insured was disabled barred punitive damages).

to deny the claim is now subject to some doubt due to the recent decision in *Bankers Life & Casualty Co. v. Crenshaw*.⁵⁷ The court had a number of criticisms of the company's conduct, including findings that the company relied on an invalid policy provision in denying the claim;⁵⁸ that it failed to follow its own investigative procedures;⁵⁹ that the investigation it did conduct was inadequate;⁶⁰ that it failed to look at all the medical records;⁶¹ and that the doctor who gave the opinion was an employee, not a disinterested witness.⁶²

The invalid policy provision and the medical opinion were intimately associated in the denial of the claim. The court stated⁶³ that

⁵⁷ 483 So. 2d 254 (Miss. 1985). The author recognizes there is some peril in discussing this case in the medical context. This is because the court found that the company's sins, among others, included relying on a policy provision which was clearly invalid under Mississippi law. See *supra* notes 40-43 and accompanying text. However, the case is considered here because the company, in communicating its denial of the claim to the insured, relied on a doctor's evaluation of the medical records. Thus, in trying to understand *Bankers Life*, we are faced with the conflicting propositions that (1) denying a claim based on a clearly invalid policy provision will subject the insurer to punitive damages, *supra* notes 40-43 and accompanying text; and that (2) denying a claim based on a doctor's opinion protects the insurer from punitive damages, *supra* note 56. This conflict could be resolved by interpreting *Bankers Life* to say that even if the doctor determines that the claim is excludable under a policy provision, if the policy provision itself is invalid, then the doctor's opinion will not counter the effect of wrongfully relying on the provision. However, the *Bankers Life* majority does not stop with this syllogism; instead, the majority undermines this reading of the case by subsequently attacking the doctor's medical opinion as *wrong*.

⁵⁸ *Bankers Life*, 483 So. 2d at 270-71.

⁵⁹ *Id.* at 270. Bankers Life had procedures which specified obtaining personal interviews, doctor's records, signed statements, and the entire hospital record. *Id.* According to the court, "The company did *none* of this." *Id.* (emphasis in original).

⁶⁰ *Id.* A brief investigation of the claim was commissioned to Equifax Services and resulted in only minimal information. The company requested nothing further. *Id.* at 260, 270. The court also noted that the company should have interviewed the insured and his family, interviewed the insured's doctors, and looked at all medical records before the claim was denied. *Id.* at 270. The court here appears to be setting some general guidelines for the insurance industry when dealing with medical claims. The burden of any standards would, of course, vary from case to case. For example, here the company would have had to conduct ten physician interviews, because ten was the number of doctors who saw the insured. *Id.* at 268, 273 n.6. Also, the company's pursuit of medical records would necessarily have been broad since a preexisting disease was an issue in the case. *Id.* at 261-63.

⁶¹ *Id.* at 270. The company, the court said, relied on three medical records—the narrative summary, the operation report, and the pathology report—in denying the claim. *Id.* at 260, 270.

⁶² *Id.* at 273-74.

⁶³ Justice Robertson's sharply critical dissent, discussed more fully *infra* notes 86-102, parted company with the majority early. He believed that the majority had "mis-

the company knew recovery under the policy could be had when an accident sets in motion a preexisting condition which in turn contributes to the disability,⁶⁴ yet "at all times prior to trial" the company denied the claim under a policy provision which excluded coverage unless the injury caused the loss "directly and independently of all other causes and [was] effected solely through accidental bodily injury."⁶⁵ The company had quoted the policy exclusion and its doctor's opinion that the loss was caused by a disease and not an "injury" when it informed the insured that it was denying the claim.⁶⁶ The plaintiff's claim was that he had dropped a car alternator on his foot⁶⁷ and that it triggered a preexisting condition, leading to the amputation of the leg below the knee.⁶⁸ Bankers Life's physician, according to the court, concluded the claim was not payable because the trauma was not the lone cause of the amputation and thus was not covered under the policy provision,⁶⁹ which the court had already noted was invalid under Mis-

found the facts" and that some of the majority's key rationale was "disingenuous." *Id.* at 288, 291-92 (Robertson, J., dissenting with two other justices).

⁶⁴ *Bankers Life*, 483 So. 2d at 270-71. The court cited and quoted from its prior holdings to this effect. *Id.* The court further noted company memos in which this precise aspect of Mississippi law was recognized by Bankers Life. *Id.* at 262-63.

⁶⁵ *Id.* at 270-71.

⁶⁶ *Id.* at 260-61, 270-71.

⁶⁷ *Id.* at 260 n.3.

⁶⁸ *Id.* at 266-67.

⁶⁹ *See id.* at 270-71. The court chronicled the series of correspondence between the company and the insured and his representatives and the company's interoffice communication. *See id.* at 260-264. For instance, the court cited the initial denial statement from the company, which first quoted the policy provision in question and then stated its conclusion that the loss was caused by the disease and was not "due to an injury as defined above." *Id.* at 260-61. A request for reconsideration of the claim resulted in a response from Bankers Life to the effect that the company would need additional information which showed the loss was due to "an accidental bodily injury directly and independently of all other causes." *Id.* at 261-62. This message was repeated in response to an inquiry from the insured's attorney. *See id.* at 263. Subsequent to another demand for payment, the company responded: "In conclusion, Mr. Crenshaw has a very common disease for which various therapies are instituted. No trauma is necessary to produce the end results suffered by Mr. Crenshaw." *Id.* at 264. The court believed the extensive correspondence revealed that Bankers Life was taking the position that even had the trauma occurred, and even had it aggravated the disease, it was excludable under the policy. Yet interoffice communication quoted by the court stated that the trauma "has not been documented" and, even if it had, "there would be no cause and effect situation." *Id.* The court did not make it clear whether its conclusion that the company relied on the invalid policy provision was because the company *should have discovered* that the trauma occurred and contributed to the loss or because the company *did know* about the trauma but denied the claim anyway. If the conclusion is based on what the company *should have found out*, is this a case of bad faith liability based on negligence? Gross

Mississippi law.⁷⁰ The court rhetorically wondered how many of Bankers Life's insureds had "sustained some minor injury" which led to serious problems because of a preexisting condition and, unaware of Mississippi law, took the policy exclusion at face value and concluded they were not covered.⁷¹ By making a "deliberate choice to deny coverage for an invalid reason," Bankers Life had "played the odds in this case and lost."⁷²

As for the medical records, the court pointed out that Bankers Life reviewed only some of the records before denying the claim.⁷³ Since an alleged trauma to the insured's foot was a key issue in the claim, the court put emphasis on the lack of an emergency room report⁷⁴ and the failure of Bankers Life to obtain such report.⁷⁵

Finally, the majority had a number of criticisms of the company's Dr. McParland. The court said that it was "foolhardy" for the doctor to attempt a diagnosis on incomplete records, that the doctor "willingly accommodated" Bankers Life's executive personnel in their attempts to "use" him, and that the doctor never required Bankers Life to obtain an emergency room report.⁷⁶ The court pointed out that the doctor was not a "disinterested witness," but rather an employee⁷⁷ who derived one-fifth of his total salary from evaluating medical claims for the company.⁷⁸ The court noted that whether the company had an arguable reason to deny payment was determined by the reason the company gave when it denied the claim and not at its trial defense.⁷⁹ The majority then attacked the doctor's trial testimony.⁸⁰ For instance, the

negligence?

⁷⁰ *Id.* at 270-71.

⁷¹ *Id.* at 271.

⁷² *Id.*

⁷³ See *supra* note 61.

⁷⁴ *Bankers Life*, 483 So. 2d at 271.

⁷⁵ *Id.* at 271, 272-73. The court reprinted two pieces of correspondence to the insured from Bankers Life which noted the absence of medical records indicating trauma. In one letter, addressed to the insured's employer (who processed claims under the group insurance policy covering Mr. Crenshaw), the company stated that, in order to pay, it would need "additional medical information showing that Mr. Crenshaw's loss was due to an accidental bodily injury directly and independently of all other causes." *Id.* at 262. Later, the company responded to Mr. Crenshaw's attorney with a letter noting the absence of an emergency room report. *Id.* at 264. Obviously, the court decided that these communications did not amount to a request for the report.

⁷⁶ *Id.* at 272-73.

⁷⁷ *Id.* at 273-74.

⁷⁸ *Id.* at 260.

⁷⁹ *Id.* at 273-74.

⁸⁰ The court did not explain why it was necessary to evaluate the company doctor's

court cited medical encyclopedias to rebut the doctor's opinion.⁸¹ The court further questioned whether the doctor was "a witness or an advocate."⁸² The court concluded that "even the medical records dispute Dr. McParland."⁸³

The court said that normally the company can choose, between two medical theories, the medical opinion favorable to its position and thereby avoid punitive damages.⁸⁴ Here, however, the opinion was of an employee, not a "disinterested" witness.⁸⁵

Justice Robertson dissented caustically.⁸⁶ He accused the majority of imputing "sinister motives" to Bankers Life personnel;⁸⁷ of stepping "wholly outside its adjudicatory function and degenerat[ing] into pure advocacy" in attempting to discredit the company doctor;⁸⁸ and of set-

trial testimony when it had just said that the arguable reason issue was to be resolved by looking to the reason the company gave *at the time it denied the claim*.

⁸¹ *Id.* at 274-75. If the court was confident that the company denied the claim on the basis of an invalid policy provision, then it logically follows that the doctor's trial testimony would be unimportant. This is especially true given the majority's view that the company denied the claim not because there was a question as to whether the trauma played any part in the loss, but rather because it did not cause the loss "directly and independently of all other causes." *See id.* at 273-74. The court noted that Bankers Life might even have been estopped to assert that the trauma had nothing to do with the loss, since the court said it offered "this variant defense for the first time at trial." *Id.* Of course, the trial testimony would be important if the court was of the opinion that even absent the invalid policy provision, the company's reliance on the opinion of the doctor was insufficient to preclude punitive damages. If this latter view is the holding of the court, the defense of a doctor's opinion is now no defense at all.

⁸² *Id.* at 274.

⁸³ *Id.* at 274-75. For some reason, the court appeared to believe it was necessary to show why Dr. McParland's medical judgment was not correct. The court pointed out that the view of the doctor was contrary to the view of two doctors for the plaintiff. *Id.* The court compared evidence which it felt had the effect of "demolishing" the company doctor's position. *Id.* at 275. The court stated that the other doctors' testimony "sent up in smoke" the company doctor's opinion, *id.* at 276 n.9, and then chided Dr. McParland for not altering his opinion once he was confronted with what the court found "testified *fact*" to the contrary. *Id.* (emphasis in original). This visceral attack, which itself implicitly cast doubt on the court's impartiality in viewing the record, is unprecedented in Mississippi bad faith cases.

⁸⁴ *Id.* at 273-74.

⁸⁵ *Id.* This particular passage in the court's opinion is confusing. Was the court implying that the company doctor's opinion was so without medical credence that Bankers Life could not have avoided punitive damages even absent the reliance on an invalid policy provision?

⁸⁶ Presiding Justice Walker and Justice Prather joined in this dissent.

⁸⁷ *Bankers Life*, 483 So. 2d at 283 (Robertson, J., dissenting).

⁸⁸ *Id.* Later in his dissent, Justice Robertson repeated his charge, stating that the majority engaged in "Rank Advocacy." *Id.* at 289.

ting itself up as a medical expert.⁸⁹ Specifically, Justice Robertson said that the majority's view that the company based its denial on an invalid policy provision involved "much judicial legerdemain."⁹⁰ He stated that nothing in the record indicated that the company denied the claim by "the literal invoking of the policy language."⁹¹

As to the medical records, Justice Robertson pointed out that when the company's doctor did see all the records, they simply confirmed his original opinion.⁹²

Turning to the majority's evaluation of Dr. McParland's testimony, Justice Robertson took offense to the majority's "cross-examination" of the doctor.⁹³ He cited the trial record to show that even the plaintiff's doctors agreed that the company doctor's theory was "perfectly conceivable"⁹⁴ and that no one had ever questioned that the plaintiff did indeed have a preexisting disease.⁹⁵ The dissent said that instead of showing why the company doctor was not qualified to give expert testimony, the majority simply cross-examined the doctor on appeal and made a "jury argument that the good doctor's opinion is flawed."⁹⁶ Justice Robertson noted that the company doctor was the only medical witness who was an expert in vascular surgery⁹⁷ and that

⁸⁹ *Id.* at 291.

⁹⁰ Justice Robertson said a "careful reading" of Bankers Life's letters reflected the basis for denial as being that the loss was caused *solely* by a preexisting condition. *Id.* at 283. Given this view, Justice Robertson stated that the fact that the denial letters merely included an unenforceable definition of "injury" was "irrelevant." *Id.* at 286-87 n.7.

⁹¹ *Id.* at 292. Justice Robertson believed the record proved that the company denied the claim because it believed the loss was caused solely by a preexisting condition and stated that the majority opinion "obfuscates this feature of the claim denial letters." *Id.* at 291.

⁹² *Id.* at 283.

⁹³ *Id.*

⁹⁴ *Id.* at 285.

⁹⁵ *Id.* at 283.

⁹⁶ *Id.* at 283-84. Justice Robertson stated that by its tactics, the "majority opinion discredits itself." *Id.* at 289. He also found unconvincing the majority's emphasis on the fact that the doctor received 20% of his income from the insurance company. *Id.* He inquired as to whether the arrangement would have been so "pernicious" had the amount been ten, five or one percent. *Id.* Furthermore, the justice could not see how the opinion would have been more credible if it had come from an independent contractor rather than an employee. *See id.* at 290. "I have never heard of anyone suggesting that this Court should castigate the credibility of such a witness because of his relationship to the defendant company." *Id.* In addition to Justice Robertson's cogent and dispassionate dismantling of the majority's rationale, an arguably logical extension of the majority's view is that, since expert witnesses are compensated by the respective parties, such payments make these experts' opinions incredible.

⁹⁷ *Id.* at 284 n.1.

his credentials were "qualitatively and quantitatively" better than those of the plaintiff's physician.⁹⁸ He added that the "undisguised advocacy" on appeal was "unprecedented in our jurisprudence."⁹⁹

By precluding the insurance company from relying on the doctor's opinion as a reason to deny the claim, the majority had, according to Justice Robertson, set itself up as "medical experts." Such an approach, Justice Robertson noted, carries "the potential for mischief."¹⁰⁰

Generally speaking, Justice Robertson felt it was a "relatively uncontroversial proposition" that, in a case like *Bankers Life*, an insurer's reliance on a physician's opinion would be an arguable reason as a matter of law to deny a claim.¹⁰¹ Here, the insurer relied on a "highly qualified physician" and, Justice Robertson stated, that "generally ought to be enough."¹⁰²

The intertwined issues and the confusion emanating from the majority opinion have put into question the heretofore understood rule that a physician's opinion would protect the insurer from punitive damages. Indeed, the *Bankers Life* majority recognizes this as a general rule,¹⁰³ but fails to clearly delineate when the general rule does not apply. By its vigorous attack on the company doctor's opinion in *Bankers Life*, the majority implies that an opinion rendered by a non-treating doctor on the basis of less than all of the medical records would not justify the company in relying on such an opinion. Justice Robertson's clear, well-reasoned and even-handed dissent includes a more credible rule of a physician's opinion as an arguable reason for denying an insurance claim. It is hoped that in the next analogous case, the majority will either state a more precise rule for reliance on a medical opinion or will adopt that portion of Justice Robertson's dissent¹⁰⁴ which provides

⁹⁸ *Id.* at 285 n.4.

⁹⁹ *Id.* at 290.

¹⁰⁰ *Id.* at 291.

¹⁰¹ *Id.* at 290-91. The dissent cited *Peel v. American Fidelity Assurance Co.*, 680 F.2d 374 (5th Cir. 1982), among other cases, as precedent for this proposition. *Bankers Life*, 483 So. 2d at 290-91 (Robertson, J., dissenting). Justice Robertson noted that the *Peel* case was not even mentioned in the opinion of the court "although the majority shows great affection for other Fifth Circuit cases." *Bankers Life*, 483 So. 2d at 291. He further noted that such reliance upon a doctor would be unjustified only where the opinion was inadmissible or fraudulently rendered. *Id.* But, as the dissent noted, the majority never suggested either possibility. *See id.* at 295-96.

¹⁰² *Bankers Life*, 483 So. 2d at 290-91.

¹⁰³ *Id.* at 273-74.

¹⁰⁴ *Id.* at 290-91 (Robertson, J., dissenting). This view, as stated above, would hold that an insurer's reliance upon a physician's opinion would provide an arguable reason as a matter of law to deny a claim, unless the medical expert was not qualified to give an

a more coherent approach to the question.

In one other area of medical claims, the insurance company cannot be faulted for refusing to pay a claim when incomplete or inaccurate medical records are provided through no fault of the insurer. In *Blue Cross & Blue Shield v. Campbell*,¹⁰⁵ the plaintiff-insured, when applying for a hospitalization policy, stated he had no history of alcoholism or ulcer problems.¹⁰⁶ Plaintiff was hospitalized and a claim was forwarded to Blue Cross.¹⁰⁷ The medical reports stated the diagnosis as "acute alcoholic pancreatitis."¹⁰⁸ Blue Cross requested more information, and the resulting records indicated that the plaintiff had a history of ulcer problems and alcohol abuse; based on this information, Blue Cross denied the claim.¹⁰⁹ Plaintiff's attorney sent a letter to Blue Cross, enclosing a note from the plaintiff's physician stating that plaintiff's condition was not a preexisting one.¹¹⁰ Blue Cross reevaluated the claim and decided to pay.¹¹¹ Plaintiff later sued Blue Cross and the jury returned an award of actual, but not punitives, damages.¹¹² The Mississippi Supreme Court held not only that there was no issue as to punitive damages, but also that Blue Cross was entitled to a judgment notwithstanding the verdict on the contract claim.¹¹³ The court noted that the records supplied to Blue Cross clearly indicated a preexisting condition, and that the company had only those records when it denied the claim.¹¹⁴ Further, Blue Cross paid as soon as it received the physician's note and, thus, no damages were justified.¹¹⁵

opinion, the opinion was inadmissible, or the opinion was fraudulently given. *Id.*

¹⁰⁵ 466 So. 2d 833 (Miss. 1984).

¹⁰⁶ *Id.* at 834.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 834-35.

¹¹⁰ *Id.* at 836.

¹¹¹ *Id.*

¹¹² *Id.* at 839.

¹¹³ *Id.*

¹¹⁴ *Id.* at 839-40. The court stated that Blue Cross paid even though the claim "remains subject to serious doubt." *Id.* at 840.

Campbell can be distinguished from *Reserve Life v. McGee*, see discussion *supra* notes 44-51 and accompanying text. In *Reserve Life*, the preexisting condition had nothing to do with the illness on which the claim was based. In *Campbell*, the hospital records showed that the claimed illness was *precisely* the kind of condition for which Mr. Campbell had been repeatedly treated before the issuance of the Blue Cross policy. Blue Cross did not contend it would have refused to issue the policy had it known of the preexisting condition; its investigation was not conducted with the intent to void the policy, but simply to determine if the ailment in question was covered by the policy.

¹¹⁵ *Campbell*, 466 So. 2d at 841.

Finally, it should be remembered that the arguable reason is tested by the reason the company had or gave at the time it denied the claim.¹¹⁶

3. The Extent of Permissible Punitive Damages

The Mississippi Supreme Court's latest word on the acceptable limits of punitive damages is probably its clearest word, albeit disheartening to insurance companies. An award of punitive damages, unprecedented in its amount in Mississippi law, of \$1.6 million against an insurance company was affirmed in *Bankers Life & Casualty Co. v. Crenshaw*.¹¹⁷ Once it is determined that punitive damages are proper, the court stated, the amount is governed by "certain general factors," including (1) such amount as is necessary for punishment of the defendant and deterring him from similar conduct in the future;¹¹⁸ (2) such amount as is reasonably necessary to "make an example of the defendant" so that others would eschew the same or similar practice;¹¹⁹ and (3) the "pecuniary ability or financial worth of the defendant."¹²⁰

¹¹⁶ *State Farm Fire & Casualty Co. v. Simpson*, 477 So. 2d 242, 251 (Miss. 1985)(reason for denial tested by information insurer had before it when it denied the claim); *Blue Cross & Blue Shield v. Campbell*, 466 So. 2d 833, 840 (Miss. 1984)(same). In connection with this rule, the company may use hearsay and other information which is not admissible in court when deciding whether to pay a claim. *Simpson*, 477 So. 2d at 251.

¹¹⁷ 483 So. 2d at 279. For a discussion of the facts and holding in *Bankers Life*, see *supra* notes 57-104 and accompanying text. It is noted here that the affirmance of liability for punitive damages in this case was by a 6-3 vote of the court. However, affirmance as to the amount of punitive damages was 5-4.

¹¹⁸ *Id.* at 277-78.

¹¹⁹ *Id.* It can only be imagined what shock waves reverberated through the offices of insurance companies and defense lawyers in the days following Sept. 11, 1985, the date of the *Bankers Life* opinion.

¹²⁰ *Id.* at 278. Justice Hawkins, who dissented as to the amount of punitive damages, did not dispute these well-settled principles. In his colorful dissent, he agreed that Bankers Life should be more heavily punished than "a filling station attendant, or a Piggly Wiggly store owner," but he could not agree with the premise that "the bigger they are the more we ought to zap them." *Id.* at 280 (Hawkins, J., dissenting as to Part II). Justice Hawkins reasoned that an award "one-fifth the size of this would set off warning gongs and flashes in the headquarters of every insurance company in this country." *Id.* at 281. He further suggested that *Bankers Life* would be "Exhibit A in the argument of all those who wish to do away with punitive damages altogether, reduce them to a meaningless penalty, or create an impossible standard to make any punitive damages award." *Id.* Since Bankers Life had never been sued for punitive damages in Mississippi, Justice Hawkins thought the amount too much. *Id.* at 282. Thus, the justice who wrote for the *Bankers Life* majority in affirming liability for punitive damages found the amount "grossly exceed[ed]" what was necessary for meaningful punishment, and would have reduced the amount to \$750,000. *Id.* No other justice joined this dissent.

In this context, the court noted that Bankers Life's total assets exceeded \$1.3 billion and its net assets were about \$294 million.¹²¹ The amount was solely within the discretion of the jury, and could not be disturbed unless the verdict was arbitrary or unreasonable.¹²² Finally, the court stated that the judicial conscience probably would not be shocked if the punitive award were less than one percent of the defendant's net worth; thus, since the amount here was about one half of one percent of Bankers Life's net worth, the award was held not to shock the judicial conscience.¹²³

These general guidelines set by the *Bankers Life* opinion are understandable and capable of application by the trial court.¹²⁴ It seems the court has succeeded in clarifying the rules to be followed by the trial court in determining the validity of the *amount* of a punitive damages award.

If the supreme court's position on damages in *Bankers Life* has been its position all along, then juries in the other bad faith cases had been conservative indeed before *Bankers Life*. For example, in *Standard Life Insurance Co. v. Veal*,¹²⁵ the jury awarded \$25,000 in punitive damages against a company with assets of \$85 million.¹²⁶ In *Reserve Life Insurance Co. v. McGee*,¹²⁷ a punitive damages award of \$152,000 was affirmed against a company with a net worth of \$102 million.¹²⁸ Subsequent to *Bankers Life*, the court, in *National Life & Accident Insurance Co. v. Miller*,¹²⁹ affirmed a punitive damages award of \$350,000 against a company whose net worth was \$470 million.¹³⁰ Thus, plaintiffs' attorneys can safely seek punitive damages equalling approximately one percent of the company's net worth¹³¹ and, if the jury

¹²¹ *Id.* at 278.

¹²² *Id.*

¹²³ *Id.* at 279.

¹²⁴ The logic for finding punitive damages liability in the first place, or for affirming an award this size, on the facts of *Bankers Life*, is another matter. See *supra* notes 57-104 and accompanying text.

¹²⁵ 354 So. 2d 239 (Miss. 1977).

¹²⁶ *Id.* at 240, 249. This award was less than .03% of the assets. The award in *Bankers Life* was .514421% of the company's net worth. *Bankers Life*, 483 So. 2d at 279.

¹²⁷ 444 So. 2d 803 (Miss. 1983).

¹²⁸ *Id.* at 812. This award was slightly more than .1% of the company's net worth.

¹²⁹ No. 54,702 (Miss. Nov. 13, 1985).

¹³⁰ *Id.*, slip op. at 19. This award was slightly more than .07% of the company's net worth.

¹³¹ It is notable that while the court affirmed a punitive damages award of \$50,000 in *Wetherbee*, 368 So. 2d 829, the court made no reference to the net worth of the company. Similarly, net worth was not discussed in *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, No. 54,698 (Miss. Mar. 5, 1986) (\$250,000 punitive damages). This is puzzling given

bites, can apparently successfully defend the amount¹³² on appeal.¹³³

III. TRIAL PROCEDURE IN PUNITIVE DAMAGES CASES

Or

WHEN SHOULD THE JURY BE THE JUDGE?

Although the Mississippi Supreme Court in 1977 laid down the principles to be considered in bad faith cases,¹³⁴ procedural rules were, for several years afterwards, conspicuous in their absence. Six years after *Veal*, it was noted: "The court has not stated an explicit rule for when the issue of punitive damages should go to the jury in such cases."¹³⁵

Enter *Reserve Life Insurance Co. v. McGee*.¹³⁶ In an attempt to formulate a workable trial procedure, the court purported to "clearly state our position" on when punitive damages should go to the jury.¹³⁷

That position was as follows:

the position that the jury, in awarding punitive damages, consider the worth of the company. See *supra* notes 117-20 and accompanying text.

¹³² The amount of punitive damages awards bear little, if any, relation to the amount owing under the contract of insurance. Cf. *Mississippi Farm Bureau Mut. Ins. Co. v. Miller*, No. 54,698, slip op. at 14 (Miss. Mar. 5, 1986) (punitive damages of \$250,000; \$25,000 policy damages); *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764, 765-66 (Miss. 1985) (\$10,000 punitive damages; \$11,902.80 policy damages); *National Life & Accident Ins. Co. v. Miller*, No. 54,702, slip op. at 2, 19 (Miss. Nov. 13, 1985) (\$350,000 punitive damages; \$2,500 policy damages); *Bankers Life*, 483 So. 2d 254 (punitive damages of \$1.6 million assessed; \$20,000 policy damages); *Reserve Life*, 444 So. 2d at 804 (\$158,000 punitive damages; \$2,416 policy damages); *Wetherbee*, 368 So. 2d at 830, 836 (\$50,000 punitive damages; \$28,500 policy damages); *Veal*, 354 So. 2d at 240 (\$25,000 punitive damages; \$1,008 policy damages).

¹³³ That is assuming, of course, that the supreme court finds that the company had no arguable reason to refuse payment.

¹³⁴ See *Veal*, 354 So. 2d 239. For a discussion of *Veal*, see *supra* notes 14-25 and accompanying text.

¹³⁵ *Freeland and Freeland*, *supra* note 2, at 237.

¹³⁶ 444 So. 2d 803 (Miss. 1983). For a discussion of the facts in *Reserve Life*, see *supra* notes 44-51 and accompanying text.

¹³⁷ *Reserve Life*, 444 So. 2d at 809. Unfortunately, the majority's "clearly" stated position wasn't so clear. "[T]he language employed [by the majority] fails to convey with reasonable precision the process to be followed." *Id.* at 814-15 (Robertson, J., specially concurring). Furthermore, had the trial procedure been "clearly" stated, the court probably would not have felt compelled to clarify its position in two subsequent opinions. See *State Farm Fire & Casualty Co. v. Simpson*, 477 So. 2d 242, 252, 254 (Miss. 1985) (discussed trial procedure in bad faith cases); *Campbell*, 466 So. 2d at 843 (discussed the "confusion emanating from *Reserve Life*").

1. At the conclusion of the evidence, the trial court at the request of the defendant, should determine whether or not, as a question of law, the insurer had a legitimate or arguable reason to deny payment of the claim. Of course, such a reason should be a reasonable one. If the trial court finds that such a legitimate or arguable claim existed, as shown by the evidence, then the trial court should refuse to grant a punitive damages instruction even though it submits to the jury the question of whether or not the insurer owed the compensatory claim for which proof of loss were filed. Legitimate or arguable defenses do not mean that the insurer is entitled to a directed verdict on payment of the claim. The trial court, of course, has the question as to whether or not as a matter of law the insurer had the right to deny payment of the actual money claimed under the policy.¹³⁸

2. In the event the trial court determines that as a matter of law it cannot hold that the insurer had a legitimate and arguable defensive position, but that the evidence constituted disputed facts as to whether or not such situation existed, then the trial court should submit that issue to the jury.¹³⁹

3. After deciding the threshold question of whether or not it is a jury question on the issue of legitimate or arguable reason to deny or cancel, the trial court then should make a determination as to whether or not the evidence is sufficient to submit a punitive damages instruction to the jury under the guidelines set out in *Veal*. . . .¹⁴⁰

Thus, step one precludes punitive damages if the trial court finds an arguable reason as a matter of law. Step two provides that if a factual question exists as to whether an arguable reason existed, then that issue should go to the jury.¹⁴¹ Under the third step, once the trial judge has decided whether a jury issue exists on the arguable reason, he must decide whether the evidence warrants a punitive damages instruction.¹⁴² This step seems to indicate that the trial judge may allow the

¹³⁸ *Reserve Life*, 444 So. 2d at 809.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 810.

¹⁴¹ The court later further explained that this kind of situation would exist where the defendant company's arguable reason claim was the result of a "contrived or specious defense." *Campbell*, 466 So. 2d at 843.

¹⁴² This is similar to the suggestion of Freeland and Freeland, *supra* note 2.

jury to find that no arguable reason to deny the claim existed, and still, in some cases, find that punitive damages are not proper.¹⁴³ This interpretation of step three has been proven correct.¹⁴⁴

Aside from the explicit language, one relatively discernible purpose of *Reserve Life* was to emphasize the authority of the trial judge to himself dispose of the punitive damages question.¹⁴⁵

Apparently, trial courts in Mississippi didn't get the message.¹⁴⁶ In *Blue Cross & Blue Shield v. Campbell*,¹⁴⁷ the court granted a petition for rehearing¹⁴⁸ in order "to clarify what we stated in our majority holding in [*Reserve Life*]."¹⁴⁹

In *Campbell*, the court rejected Mr. Campbell's argument that the question of bad faith conduct is always one for the jury.¹⁵⁰ The court

¹⁴³ The court referred back to its decision in *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239, 247 (Miss. 1978), where the court said punitive damages may be recovered where the breach of contract is "attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort." The rule came to be that even if no arguable reason exists, the trial judge must make a further determination as to whether the defendant's conduct was so outrageous that the jury should be allowed to impose punitive damages. See *infra* note 144; cf. *Freeland and Freeland, supra* note 2, at 270-76.

¹⁴⁴ See *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764, 769 (Miss. 1985) (citing *State Farm Fire & Casualty Co. v. Simpson*, 477 So. 2d 242 (Miss. 1985)) (punitive damages not "mandated" by absence of arguable reason). This argument is correct because, as was noted in *Simpson*, denial of a claim due to the insurer's negligence does not give rise to an arguable reason, but neither does it justify punitive damages. *Simpson*, 477 So. 2d at 250.

¹⁴⁵ For instance, the majority opinion noted that in the "vast majority" of bad faith claims, the court had found an arguable reason to deny payment. *Reserve Life*, 444 So. 2d at 809. "In only two or three cases have we held that this was a fact for the determination of the jury. . . ." *Id.*

¹⁴⁶ Of course, in light of the foregoing discussion, it could be that the trial judge did not know exactly what message he was supposed to get. In a concurrence in *Reserve Life*, Justice Robertson suggested that the trial judge submit to the jury special verdicts on the factual questions and affirmative defenses. *Id.* at 818 (Robertson, J., specially concurring). After that verdict is given, if the trial judge feels he properly submitted the claim to the jury (because the plaintiff was not entitled to a peremptory instruction on the policy issue), punitive damages would be precluded. *Id.* Justice Robertson viewed the holding of the trial judge that the plaintiff was not entitled to a directed verdict on the contract claim as "tantamount" to a finding of an arguable reason for refusing the claim. *Id.* Justice Robertson spoke to the same question in his dissent in *Bankers Life*, 483 So. 2d at 294-97 (Robertson, J., dissenting).

¹⁴⁷ 466 So. 2d 833 (Miss. 1984).

¹⁴⁸ In the original opinion, the court had reversed an award of actual damages against an insurance company. *Id.* at 841. For a discussion of the facts and the finding of an arguable reason, see notes 105-15 and accompanying text.

¹⁴⁹ *Id.* at 841.

¹⁵⁰ *Id.* at 841-42. The plaintiff Campbell argued that the guidelines in *Paymaster Oil*

said that such a view "ignores an additional requirement in all punitive damages cases, or any other case in which a plaintiff asks a court to impose special damages beyond conventional damages generally allowed a successful plaintiff in a tort or breach of contract case."¹⁵¹ The court stated that the trial judge must review *all* the evidence¹⁵² to determine if the facts justify submission of the punitive damages question to the jury.¹⁵³ The court said flatly that if a trial judge finds a "reasonably arguable basis, either in fact or law," to deny the claim, then the jury should not be given the issue of punitive damages.¹⁵⁴ The court pounded the point home further by noting that a plaintiff seeking "bad faith" damages against an insurance company has a "heavy burden."¹⁵⁵

The court then used language which was music to the ears of insurance companies:

It can be argued with considerable persuasion that unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and, therefore, the carrier should never be subjected to the possibility of punitive damages based upon "bad faith."

There is compelling logic behind this argument and this would certainly appear to be true in the vast majority of cases.

Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975), dictated such a result. *Campbell*, 466 So. 2d at 841. The *Paymaster* rule stated that the trial judge, when determining whether a defendant is entitled to judgment as a matter of law, should consider the evidence most favorably for the plaintiff, disregard evidence of the defendant which is unfavorable to the plaintiff, and refuse judgment for the defendant if the evidence, so viewed, and reasonable inferences, would support a judgment for the plaintiff. *Paymaster*, 319 So. 2d at 657. The *Paymaster* court said this rule applied to peremptory instructions and requests for judgments notwithstanding the verdict. *Id.*

¹⁵¹ *Campbell*, 466 So. 2d at 841-42.

¹⁵² This holding included an express reference to *Paymaster*. The *Campbell* court said the trial judge "is not guided by the simple rules of *Paymaster*, considering only one side's evidence, but rather must consider all the evidence and determine if the defendant's conduct was such that the jury should be called upon in turn to decide the justification and amount of punitive damages." *Campbell*, 466 So. 2d at 842. This rule makes good sense in light of the extraordinary nature of punitive damages.

¹⁵³ *Campbell*, 466 So. 2d at 842.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* The court admitted that its language in *Reserve Life*, see *supra* notes 136-45 and accompanying text, "might be confusing," but added that it "was never the intent" of the *Reserve Life* court to remove from the trial judge the "responsibility and function of determining from all the evidence whether or not the plaintiff had created a 'bad faith' issue." *Campbell*, 466 So. 2d at 843 & n.3.

This criterion should ordinarily determine the answer to the question.¹⁵⁶

The court left open the option of submitting both the punitive damages claim and the contract claim to the jury where the insurance company had offered "some contrived or specious defense."¹⁵⁷

The court refused to be locked in, however. It declined "to state as an absolute" that the jury could never receive a punitive damages instruction where they also decided the question of contract liability; similarly, the court said that the plaintiff will not always be entitled to a punitive damages instruction simply because he received a directed verdict on the contract claim.¹⁵⁸

The court stood firm in the views expressed in *Campbell* when it decided *State Farm Fire & Casualty Co. v. Simpson*.¹⁵⁹ The case involved a fire insurance policy and the suspicion that the insured himself burned the house.¹⁶⁰ The court found ample evidence to constitute an arguable reason to deny the claim.¹⁶¹ But more importantly, the court quoted from *Campbell*¹⁶² in discussing the duty of the trial court.¹⁶³ In this vein, nothing changed from *Campbell*.¹⁶⁴ However, the court, expressly noting that it was engaging in dicta, offered some intriguing language in advising trial courts of acceptable procedures in bad faith cases. When a "rare" case arises which justifies the submission to the jury of both the contract and punitive damages claims, the

¹⁵⁶ *Campbell*, 466 So. 2d at 843.

¹⁵⁷ *Id.* Such a "special" case was *Reserve Life*, the court said. *Campbell*, 466 So. 2d at 843.

¹⁵⁸ *Campbell*, 466 So. 2d at 843. Despite the openings left by the court, the general rule of no bad faith damages where there was no directed verdict for the plaintiff on the policy adds some certainty to the question of when punitive damages should be imposed in insurance cases. Whether or not this certainty is desirable depends upon whether one represents a policyholder or an insurer.

¹⁵⁹ 477 So. 2d 242 (Miss. 1985).

¹⁶⁰ *Id.* at 247.

¹⁶¹ *See id.* at 251-52.

¹⁶² The court quoted language from *Campbell*, 466 So. 2d at 843. *Simpson*, 477 So. 2d at 252.

¹⁶³ *Simpson*, 477 So. 2d at 252. Interestingly, the court stated that the question of the existence of an arguable reason should be passed on by the trial court under "the same rules as are applicable in any other jury trial," citing *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975). *But cf. supra* notes 147-58 and accompanying text (where the *Campbell* court appeared to have modified *Paymaster's* rules in cases involving punitive damages).

¹⁶⁴ For instance, the court continued to assert that the "great majority" of punitive damages cases "should be ended by the trial court's refusal of a peremptory instruction for the plaintiff." *Simpson*, 477 So. 2d at 254.

court stated that the "commingling" of the two issues (contractual damages and punitive damages) was usually prejudicial to the defendant "because the wealth of the defendant has to be presented to the jury as an essential to appropriate punishment, although financial worth is totally irrelevant to the issue of contractual damages."¹⁶⁵ To avoid this prejudice, the court suggested a "severance" of the two issues.¹⁶⁶ This could be accomplished by the use of special verdicts¹⁶⁷ or separate trials.¹⁶⁸ These suggestions were made in the final three paragraphs of the court's opinion. To what extent the court will pursue those suggestions remains to be seen.¹⁶⁹

The initial outlook for the procedural suggestions embodied in the *Simpson* dicta was bleak. In its very next bad faith case, *Bankers Life & Casualty Co. v. Crenshaw*,¹⁷⁰ the Mississippi Supreme Court affirmed a punitive damages award in a case in which both the questions of contractual liability and arguable reason went to the jury. This is precisely the situation envisioned by the court in *Simpson* when it stated that the commingling of the two issues could be prejudicial to the defendant company and a special verdict or separate trials might be in order.¹⁷¹ Yet in *Bankers Life*, not only did the majority decline to tell why the *Simpson* suggestions were inappropriate to this case, but the *Simpson* decision was not even cited in a fifty-page majority opinion. In fact, of three opinions written in *Bankers Life*,¹⁷² not even one referred to the *Simpson* discussion of special verdicts or separate trials.¹⁷³ Moreover, in the three bad faith cases succeeding *Bankers Life* (through mid-March 1986),¹⁷⁴ the *Simpson* suggestions were absent. It

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* This would be pursuant to Miss. R. Civ. P. 49. This is the recommendation of Justice Robertson in his special concurrence in *Reserve Life*. See *supra* note 146.

¹⁶⁸ *Simpson*, 477 So. 2d at 254. This would be pursuant to Miss. R. Civ. P. 42.

¹⁶⁹ The supreme court obviously has chosen to give the trial court a great deal of latitude in the procedural conduct of bad faith cases. Perhaps the court wants to see some experimentation with these rules in the bad faith context.

¹⁷⁰ 483 So. 2d 254 (Miss. 1985).

¹⁷¹ See *supra* notes 165-69 and accompanying text. The *Simpson* case preceded *Bankers Life* by less than one month.

¹⁷² A majority opinion, authored in part by Justice Hawkins and in part by Justice Sullivan; a dissent by Justice Hawkins as to the amount of damages awarded by the trial court; and a dissent by Justice Robertson, joined by Walker and Prather, JJ.

¹⁷³ Justice Robertson's dissent, discussed *supra* notes 86-102 and accompanying text, did discuss the *Simpson* holding itself several times, but made no reference to the issue of special verdicts which he advocated in *Campbell*, 466 So. 2d at 853 (Robertson, J., concurring).

¹⁷⁴ *Mississippi Farm Bureau Mut. Ins. Co. v. Todd*, No. 54,698, slip op. (Miss. Mar.

appears then, that for the time being at least, not only was the *Simpson* language dicta, but it was absolutely meaningless dicta.¹⁷⁵

There is another, more fundamental question raised by the *Bankers Life* opinion. At trial, the judge submitted both the issue of contract liability and the question of punitive damages to the jury.¹⁷⁶ This seems to be contrary to the opinion in *Campbell*¹⁷⁷ that usually the absence of a directed verdict for the plaintiff on the policy claim will protect the insurer from punitive damages.¹⁷⁸ This inconsistency may be explained because the *Bankers Life* court apparently found this was one of the "rare cases"¹⁷⁹ justifying the dual submission to the jury because Bankers Life's defense was "specious."¹⁸⁰ Furthermore, the court equated the lack of an arguable reason to deny payment with justification for a punitive damages instruction.¹⁸¹

Justice Robertson, in his *Bankers Life* dissent,¹⁸² argued that the failure of the trial judge to grant a peremptory instruction to the plaintiff on the contract should have precluded a punitive damages instruction against Bankers Life.¹⁸³ He noted the majority "doesn't even mention . . . one of the central premises" of *Campbell* and *Simpson*—that the lack of a directed verdict on the contract protects the insurer from punitive damages.¹⁸⁴ Since the majority did not say that the defense of

5, 1986) *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764 (Miss. 1985); *National Life & Accident Ins. Co. v. Miller*, No. 54,702 (Miss. Nov. 13, 1985).

¹⁷⁵ It is difficult to discern why the court made the suggestions in *Simpson* when, at its later opportunities to elaborate, it acted as if *Simpson* had never included those suggestions.

¹⁷⁶ *Bankers Life*, 483 So. 2d 254, 256.

¹⁷⁷ *Blue Cross & Blue Shield v. Campbell*, 466 So. 2d 833 (Miss. 1984).

¹⁷⁸ *Id.* at 843. The court did not even discuss the cornerstone language of *Campbell*, reprinted at text accompanying note 156.

¹⁷⁹ See *State Farm Fire & Casualty Co. v. Simpson*, 277 So. 2d 242, 254 (Miss. 1985).

¹⁸⁰ *Bankers Life*, 483 So. 2d at 272. However, there is no indication that the trial court made an independent determination that a punitive damages instruction was proper even though the company had no arguable reason to deny payment. Such a determination was called for in *Reserve Life*. See *supra* notes 136-44 and accompanying text.

¹⁸¹ *Bankers Life*, 483 So. 2d at 271. However, the court apparently did not mean exactly that because, in a later bad faith case, it returned to the *Simpson* view that lack of an arguable reason does not necessarily require a punitive damages instruction—for example, mere negligent failure to pay a claim is not an arguable reason, but neither does it justify punitive damages. *Southern United Life Ins. Co. v. Caves*, 481 So. 2d 764, 769 (Miss. 1985) (citing *Simpson*, 477 So. 2d at 250).

¹⁸² *Bankers Life*, 483 So. 2d at 282 (Robertson, J., dissenting with two other justices).

¹⁸³ *Id.* at 294.

¹⁸⁴ *Id.* Justice Robertson said adherence to the *Campbell-Simpson* principles would have required reversal in this case. *Id.* at 283.

Bankers Life was a "lie" or the "product of fraud," then no punitive damages were proper, under the court's own precedents, since there was no directed verdict on the contract claim.¹⁸⁵ Justice Robertson stated that in light of the court's departure from established principles, "the whole fabric of our law of bad faith refusal cases is seen rent with confusion and inconsistency."¹⁸⁶ The dissent added that by failing to explain why *Bankers Life* was not one of the "vast majority of cases" in which there should be no punitive damages without a directed verdict for the plaintiff on the policy claim,¹⁸⁷ the majority had both modified the court's prior decisions and allowed punitive damages to be assessed on a less stringent showing than is applicable to "all other punitive damages cases."¹⁸⁸

Justice Robertson's justifiable concern about the *Bankers Life* majority's avoidance of the *Campbell-Simpson* rules may have been alleviated by subsequent events. The court proceeded from the mindbending majority opinion in *Bankers Life* to a reaffirmance of the *Campbell-Simpson* rule in three subsequent cases—*National Life & Accident Insurance Co. v. Miller*,¹⁸⁹ *Southern United Life Insurance Co. v. Caves*,¹⁹⁰ and *Mississippi Farm Bureau Mutual Insurance Co. v. Todd*.¹⁹¹

At first blush, *Miller* appears to be, like *Bankers Life*, in nonconformity with the *Campbell-Simpson* approach, in that the *Miller* court affirmed an award of actual and punitive damages where both issues went to the jury.¹⁹² However, from the general tenor of the court's opinion, the author believes it is at least arguable that the court felt that the trial judge could rightfully have directed a verdict for the

¹⁸⁵ *Id.* at 295-96.

¹⁸⁶ *Id.* Justice Robertson also chided the majority for holding that punitive damages may be assessed "solely" upon a showing that the claim was denied without an arguable reason. *Id.* at 296. He believed that more than an absence of an arguable reason is required. *Id.* at 296-97. Even with the absence of an arguable reason, Justice Robertson said punitive damages are not appropriate unless "the insurer has been guilty of some willful or malicious wrong or the gross or reckless disregard for the rights of others." *Id.* As an example, Justice Robertson said that a clerical error may not be an arguable reason to deny payment, but neither is it justification for punitive damages. *Id.*

¹⁸⁷ See *Campbell*, 466 So. 2d at 843.

¹⁸⁸ *Bankers Life*, 483 So. 2d at 283 (Robertson, J., dissenting).

¹⁸⁹ No. 54,702 (Miss. Nov. 13, 1985). For a discussion of the facts in *Miller*, see *supra* note 53.

¹⁹⁰ 481 So. 2d 764 (Miss. 1985). For a discussion of the facts in *Caves*, see *supra* note 53-54 and accompanying text.

¹⁹¹ No. 54,698 (Miss. Mar. 5, 1986). For a discussion of the facts in *Todd*, see *supra* note 53.

¹⁹² *Miller*, No. 54,702, slip op. at 9, 19.

plaintiffs, which would have made proper the submission of punitive damages to the jury.¹⁹³ This inference is, of course, just that—an inference.

However, the court emerged from the muddy waters of *Bankers Life* completely in its subsequent two bad faith opinions. The *Caves* opinion, which affirmed a punitive damages award, cited the *Campbell-Simpson* rule.¹⁹⁴ Since the trial judge in *Caves* granted summary judgment¹⁹⁵ to the plaintiff on the contract claim,¹⁹⁶ the court held: "There can be no question that under the cases cited the issue of punitive damages was properly presented to the jury. . . ."¹⁹⁷

Finally, although the *Campbell-Simpson* directed verdict requirement for a punitive damages instruction was not specifically cited, the *Todd* opinion is in direct compliance with that requirement since the trial judge directed a verdict for the plaintiff on the contract claim before submitting the issue of punitive damages to the jury.¹⁹⁸ Thus, the most recent¹⁹⁹ Mississippi Supreme Court cases have returned to harmony with *Campbell* and *Simpson*.

CONCLUSION

Prior to the decision in *Bankers Life*, the Mississippi Supreme Court appeared to be providing some measure of guidance to parties and trial courts in the procedure for bad faith cases. *Bankers Life* represented an aberration from, or at least a poorly-explained exception

¹⁹³ For example, a key issue in the case was the company's knowledge, through its agents, of the insured's heart murmur. Since the agents' knowledge of the murmur prevented the company from denying it knew of the condition, the court's opinion that there was "no issue of fact" concerning the agents' knowledge, *id.* at 9, at least implies that the trial judge could have granted a peremptory instruction for the plaintiff on the contract claim. If this is indeed the court's rationale, then punitive damages would have been properly submitted to the jury under the rule of *Campbell-Simpson*.

Another possible view of *Miller* is that it is simply an exception to *Campbell-Simpson* in that the company's defense was "specious" due to the improper conduct of the agents, before and at trial. See *supra* note 53. Cf. *Campbell*, 466 So. 2d at 852 (Robertson, J., concurring)(proposed "lying" exception to *Campbell* general rule against dual submission of actual and punitive damages claims to jury).

¹⁹⁴ See *Caves*, 481 So. 2d at 769.

¹⁹⁵ The court noted that summary judgment is the "functional equivalent" of a directed verdict. *Id.* Thus, the *Campbell-Simpson* rule, which by its *express* terms applied to grant or denial of directed verdicts, is now *explicitly* applicable in summary proceedings.

¹⁹⁶ *Caves*, 481 So. 2d at 769.

¹⁹⁷ *Id.*

¹⁹⁸ *Todd*, No. 54,698, slip op. at 11-12.

¹⁹⁹ This comment was completed in March of 1986.

to, that trend. However, subsequent cases²⁰⁰ have reestablished the coherent, logical rules laid down in *Campbell* and *Simpson*.²⁰¹ The court seems to have struck on an equitable, and workable, set of rules for insurance bad faith cases in Mississippi. It is to be hoped that the court will continue to adhere to those principles²⁰² and dispel the "confusion and inconsistency"²⁰³ of the decision in *Bankers Life*.*

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²⁰⁰ See *supra* notes 189-99 and accompanying text.

²⁰¹ Even assuming that the court has returned to the better rules of *Campbell* and *Simpson*, *Bankers Life* leaves us with one troubling question: What is the status of a doctor's medical opinion when an insurance company is sued for denying a claim on the basis of that opinion? If we assume that the *Bankers Life* court actually premised liability for punitive damages on the company's reliance on an invalid policy provision, see *supra* notes 40, 57, 63-72 and accompanying text, and not on the reliance on the doctor's opinion, then the latter defense should stand as an arguable reason, see *supra* note 56 and accompanying text. However, this assumption is most difficult to swallow given the *Bankers Life* majority's vigorous attack on the doctor's role in that case. See *supra* notes 76-85 and accompanying text.

²⁰² It is the author's opinion that Justice Robertson's dissent in *Bankers Life* was an excellent guide for the application of the law in Mississippi bad faith cases.

²⁰³ *Bankers Life*, 483 So. 2d at 295-96 (Robertson, J., dissenting).

* NOTE: During the 1985-86 legislative session, both chambers of the Mississippi legislature faced bills which would have limited punitive damages recoveries. Both the Senate and House bills failed to emerge from committee.

THE UNFAIRNESS OF FEDERAL PREEMPTION OF STATE LAW EXCEPTIONS TO THE EMPLOYMENT- AT-WILL RULE AND THE NEED FOR A UNIFORM NATIONAL REMEDY FOR WRONGFUL DISCHARGE*

I. INTRODUCTION

Many states have begun to recognize exceptions to the common-law doctrine of employment at will.¹ Unfortunately, many states still refuse to recognize such exceptions² and, even in those states where exceptions are recognized, employees covered by the terms of collective bargaining agreements are sometimes divested of their rights under state law by the doctrine of federal preemption.³ This comment will examine the doctrine of employment at will and the effect of the preemption of its exceptions by federal law.

First, the historical basis of the employment-at-will rule will be reviewed with special emphasis on its application in Mississippi.⁴ This will be followed by an analysis of the doctrine of preemption and its relation to the field of labor law.⁵ Next, the increasing incidence of the preemption by federal law of state court claims based on exceptions to the employment-at-will rule will be treated in depth.⁶ Finally, a comprehensive solution to the problems raised in this comment will be pro-

* The author wishes to express his appreciation to Associate Professor of Law Larry Bush of the University of Mississippi School of Law for his advice and guidance in the preparation of this Comment.

¹ See *infra* notes 12-14 and accompanying text. Approximately 70% of all private sector employees in the United States have no protection against unjust discharge. BARBASH & FEERICK, *EMPLOYMENT LAW—NEW PROBLEMS IN THE WORKPLACE* 175 (1981).

² See *infra* notes 29-40 and accompanying text. Approximately 40 states recognize one or more exceptions to the employment-at-will rule. Strasser, *The Death of a Doctrine?*, *The National Law Journal*, Jan. 20, 1986, at 1, col. 3; see also Hartsfield, *Avoiding Wrongful Discharge Claims*, 31 *PRAC. L.* 13, 14 (1985)(listing jurisdictions which recognize exceptions).

³ See *infra* notes 97-99 and accompanying text. Neither the state nor the federal courts have jurisdiction over suits directly involving activity arguably subject to § 7 or § 8 of the National Labor Relations Act (NLRA). *Vaca v. Sipes*, 386 U.S. 171 (1968) (construing 29 U.S.C. §§ 157, 158); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)(same).

⁴ See *infra* notes 8-32 and accompanying text.

⁵ See *infra* notes 34-60 and accompanying text.

⁶ See *infra* notes 61-89 and accompanying text.

posed in the form of a uniform national remedy for all victims of wrongful discharge actions.⁷ This entire analysis will support the conclusion that the employment-at-will rule has outlived its usefulness and should be abolished nationwide by some definitive act on the part of Congress.

II. THE EMPLOYMENT-AT-WILL RULE

At common law, a contract of employment for a specified duration would be enforced by the courts according to the intentions of the parties.⁸ The term of employment was presumed to be for one year and a premature termination required a one-month notice period or one month's salary in lieu of notice.⁹ In the late 1800's, however, the United States developed a new common-law rule for determining the duration of a contract of employment for an indefinite period.¹⁰ This rule was that a contract of employment for an indefinite period is at will and may be terminated by either party at any time "for good cause, bad cause, or no cause" and "for any reason or no reason."¹¹ In

⁷ See *infra* notes 101-105 and accompanying text.

⁸ Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 205 (1982).

⁹ Note, *Public Policy Limitations to the Employment-at-Will Doctrine Since Geary v. United States Steel Corporation*, 44 U. PITT. L. REV. 1115, 1117 (1983)(citing 2 J. KENT, COMMENTARIES *258-59). The rights of employers and employees at English common law were derived from the Statute of Labourers. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (1969). The presumption that followed was that a hiring for an indefinite period was intended to serve as a contract of employment for one year. *Id.* at 426.

¹⁰ Note, *supra* note 8, at 206 (development of employment-at-will rule).

¹¹ See Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 329 (1982)(employee may be discharged for "no cause, good cause, or even bad cause"); Note, *A Common Law Action for Abusively Discharged Employee*, 26 HAST. L.J. 1435, 1438 (1975)(at-will employment contract may be terminated at any time "for good cause, bad cause or no cause" or "for any reason or no reason"). As American society progressed and became more commercialized, the employment relationship changed. Note, *supra* note 9, at 1117. The common law of master and servant had been originally premised on the existence of a very personal and often familial relationship which was perceived to be no longer suitable for employment which was increasingly commercial and involved large numbers of employees. *Id.* at 1117. The change was based on the emerging theory of contract, and its principal consequence was a drastic limitation on the employer's duties to his employees. Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980)[hereinafter cited as Note, *Protecting at Will Employees Against Wrongful Discharge*].

The first court to adopt the employment-at-will doctrine was the Supreme Court of Pennsylvania. *Henry v. Pittsburgh & L.E.R. Co.*, 139 Pa. 289, 21 A. 157, 157 (1877)(em-

recent years,¹² a number of exceptions to this employment-at-will rule have developed. These exceptions have been based on both contract and tort theories¹³ and are recognized in one form or another in at least forty states.¹⁴

Two types of contract-law exceptions appear to have developed. The first involves the enforcement by the courts of promises of job security or assurances that discharge will occur only for cause.¹⁵ The second approach has been to find an obligation of good faith and fair

ployee may be discharged with or without probable cause unless restrained by contract). Interestingly, the primary legal basis used by the courts for the adoption of the employment-at-will rule was an 1877 treatise. See H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). "Wood's Rule," as it is called, was stated by its author as being that:

With us the rule is inflexible that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

Id. at 272. This rule has been challenged by commentators as being without any legal basis at the time Wood wrote his treatise. Note, *Protecting at Will Employees Against Wrongful Discharge* at 1825 n.51; Note, *supra* note 9, at 1118; Note, *supra* note 8, at 206-07; see C. SMITH, TREATISE ON THE LAW OF MASTER AND SERVANT 53 (1852) (where not limited expressly or by implication, contract of employment considered to be for one year). Some commentators have suggested that the reason for the rapid adoption of "Wood's Rule" was an attempt on the part of the courts to facilitate economic and industrial development during the industrial revolution along with freedom of contract. Note, *Protecting at Will Employees Against Wrongful Discharge*, at 1854-56; Note, *supra* note 8, at 206-08; Note, *Master and Servant—Discharge of an Employee for Pursuit of a Claim Under the Mississippi Workmen's Compensation Law Gives No Private Right of Action*, 51 MISS. L.J. 575, 577-78 (1980) [hereinafter cited as Note, *Mississippi Workmen's Compensation*]; BARBASH & FEERICK, *supra* note 1, at 176-78.

¹² It is interesting to note that the employment-at-will rule was elevated to a constitutional right to contract in *Adair v. United States*, 208 U.S. 161, 174 (1908), and in *Coppage v. Kansas*, 236 U.S. 1, 21 (1915). See Note, *supra* note 8, at 207. The United States Supreme Court did not retreat from this position until the decision rendered in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which sustained the right of employees to organize and bargain collectively under the provisions of the National Labor Relations Act of 1935. *Id.* at 43-44. Although this decision removed the constitutional basis for the employment-at-will rule, it continued to recognize the importance of that rule in society. *Id.* at 45; see Note, *supra* note 8, at 208-09 (discussing *Jones & Laughlin Steel*).

¹³ See *infra* notes 15-21 and accompanying text.

¹⁴ Annot., 12 A.L.R. 4th 544, 552-56 (1981 & Supp. 1985).

¹⁵ BARBASH & FEERICK, *supra* note 1, at 186-87; see *Toussant v. Blue Cross & Blue Shield*, 408 Mich. 579, 279 N.W.2d 880, 892 (1980) (oral or written employer assurance may give right to employee to be discharged only for cause).

dealing on the employer's part which limits his authority to discharge at will in those situations where long-term employees would soon become entitled to substantial benefits as the result of past services.¹⁶ On the other hand, four distinct types of exceptions based on tort theories can be identified.¹⁷ One exception is based on discharge for refusal to violate a criminal statute.¹⁸ Another involves discharge for performing an important public obligation.¹⁹ Still another arises upon discharge for exercising a statutory right.²⁰ The last has its foundation in dis-

¹⁶ BARBASH & FEERICK, *supra* note 1, at 186-87; see *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251, 1255-56 (1977)(contract of employment contains implied covenant of good faith and fair dealing).

¹⁷ See *infra* notes 18-21 and accompanying text.

¹⁸ The leading case concerning discharge for refusing to commit a criminal act is *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). The plaintiff in this case was fired for refusing to commit perjury when ordered to do so by his employer. *Petermann*, 344 P.2d at 27. The employee was discharged when he refused to commit perjury during an investigation of alleged illegal acts on the part of the union. *Id.* at 26-27. The California Supreme Court held that such a discharge was intended to coerce an act specifically prohibited by statute and ruled that the public policy of the state required an exception to the employment-at-will rule. *Id.* at 27. In holding that the employee had stated a cause of action, the court reached the following conclusion:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

Id.

¹⁹ The question of whether an employee could be discharged for performing an important public duty arose in *Nees v. Hocks*, 272 Or. 210, 536 P.2d 572 (1975). The employee in this case was a secretary who was discharged for serving on a jury. *Nees*, 536 P.2d at 513. The secretary had promised her employer that she would endeavor to avoid serving but then told the clerk she would like to serve. *Id.* She received a termination letter from the employer after beginning jury duty. *Id.* The Oregon Supreme Court, relying on state constitutional and statutory provisions, held that the employer's conduct was actionable. *Id.* at 516. Specifically, the court concluded the following:

These actions by the people, the legislature and the courts clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted. For these reasons we hold that the defendants are liable for discharging plaintiff because she served on the jury.

Id.

²⁰ The exception based on discharge for exercising a statutory right has arisen most often in the context of workmen's compensation. Comment, *Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas*, 34 ARK. L. REV.

charge in violation of general public policy.²¹

729, 732 (1981). In the leading case, *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), the Supreme Court of Indiana allowed an action for wrongful discharge against an employer who fired an employee solely for filing a workers' compensation claim. *Frampton*, 297 N.E.2d at 427. The court reasoned that to deny a cause of action would defeat the purpose of the Workers' Compensation Act and made this observation:

[I]n order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right.

Id.

²¹ The exception based on a discharge in violation of a state's general public policy has received more criticism than the other exceptions. Comment, *supra* note 20, at 736-37. The first decision to recognize this cause of action was *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). The employee in this case was discharged because she refused to go out with her foreman. *Monge*, 316 A.2d at 550. The plaintiff alleged that the hostility directed towards her by her foreman as a result of rejecting his advances was condoned by the defendant's personnel manager and ultimately resulted in her dismissal. *Id.* The New Hampshire Supreme Court based its decision on the state's general public policy and held that the employee's contract contained an implied term that she would not be terminated in bad faith. *Id.* at 551.

Other courts have followed the rule established by the *Monge* court. See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251, 1257 (1977)(salesman discharged to avoid paying bonus possesses cause of action). Furthermore, a cause of action arising from discharges based on actions of employees in "blowing the whistle" on employer corruption and criminal activity has also been recognized by a few courts. See *BARBASH & FEERICK, supra* note 1, at 190-91 (discussing cases in which employee exposed employers' criminal activity); Comment, *supra* note 20, at 737-38 (same). *Contra* *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 178-79 (1974)(employee denied recovery when fired for informing company vice-president that product was unsafe).

It is interesting to note that the New Hampshire Supreme Court later retreated from the strict rule established by *Monge* which appeared to allow recovery for any bad faith termination and construed that case as applying *only* to situations where public policy considerations were particularly strong. See *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980)(construing *Monge*). The court in *Howard* held that *Monge* would only apply to cases where an employee was discharged because of conduct which public policy would encourage, or because of refusal to engage in conduct which public policy would condemn. *Howard*, 414 A.2d at 1274. The Court, disregarding plaintiff's allegations of bad faith, malice and retaliation, found that the discharge in question did not fall within *Monge's* narrow interpretation. *Id.* *Howard* cast public policy into the limelight but drew bad faith, malice, and retaliation backstage. *Vandegrift v. American Brands Corp.*, 572 F. Supp. 496, 498 (D.N.H. 1983)(applying New Hampshire law); see also *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980)(a claimant must identify "a specific expression of public policy [or] he may be discharged with or without cause"). Essentially, the New Hampshire Supreme Court developed a new two-part test for *Monge*-type situations under which a plaintiff must first show that

Mississippi blindly followed the common-law rule of employment at will for over 100 years.²² Then, in 1981, the Mississippi Supreme Court was confronted with an opportunity to create an exception to this harsh rule in *Kelly v. Mississippi Valley Gas Co.*²³ *Kelly* involved the retaliatory discharge of an employee for filing a claim under the Mississippi Workers' Compensation Act.²⁴ The court refused to follow the lead of other state supreme courts and create an exception to the employment-at-will doctrine, ruling that under the doctrine of separation of powers the creation of a remedy for the victims of such retaliatory firings was a more proper subject for the legislature to consider.²⁵

The Mississippi legislature has yet to enact a law providing a remedy for a person discharged for claiming workers' compensation benefits.²⁶ By refusing to provide a cause of action to Mississippi citizens,

the defendant employer was motivated by bad faith, malice or retaliation in discharging the plaintiff employee. See *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 436 A.2d 1140, 1144 (1981). The plaintiff must then show that he was discharged for performing an act that public policy would encourage or for refusing to do something that public policy would condemn. *Cloutier*, 436 A.2d at 1144; see also *Vandegrift*, 572 F. Supp. at 498 (discussing New Hampshire law under *Monge*, *Howard* and *Cloutier*).

²² Note, *Mississippi Workmen's Compensation Law*, *supra* note 11, at 597. The Mississippi Supreme Court ruled as early as 1858 that where a service contract stipulates no agreement concerning continuance it is terminable at will. *Butler v. Smith & Tharp*, 35 Miss. 457, 464 (1858); see also *Rape v. Mobile & Ohio R.R.*, 136 Miss. 38, 53, 100 So. 585, 588 (1924)(employment unsupported by independent consideration is terminable at the pleasure of either party); *Montgomery Ward & Co. v. Skinner*, 200 Miss. 44, 61, 25 So. 2d 572, 576 (1946)(employer has legal right to discharge employee for "no reason at all").

²³ 397 So. 2d 874 (1981).

²⁴ *Id.* at 874. The plaintiff was discharged for refusing to dismiss his claim when ordered to do so by his employer. *Id.*

²⁵ See *id.* at 877. The United States Court of Appeals for the Fifth Circuit recognized Mississippi's adherence to the employment-at-will rule in *Green v. Amerada-Hess Corp.*, 612 F.2d 212, 214 (5th Cir.)(Mississippi employer has legal right to discharge at will employees without justification), *cert. denied*, 449 U.S. 952 (1980). *Contra* *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984)(action for retaliatory discharge based on pursuing workers' compensation claim recognized). *Cf.* *Smith v. Atlas Off-Shore Boat Serv.*, 653 F.2d 1057, 1063 (5th Cir. 1981)(discharge in retaliation for seaman's filing of personal injury action against employer constitutes federal maritime tort). For an analysis of the treatment given by the Fifth Circuit to the entire field of labor law, see McComb, Shuler, Koretzky, & O'Dea, *Labor Law, Fifth Circuit Symposium*, 29 Loy. L. Rev. 533, 785-833 (1983).

²⁶ The Clarion Ledger, Feb. 16, 1985, at 12B, col. 3 [hereinafter cited as the Clarion Ledger]. The proposed workers' compensation bill was tabled by a Mississippi House subcommittee after being passed by the state senate. *Id.* The failure of the legislature to take any action is particularly inexcusable since the supreme court provided an example of a fair, workable statute in a footnote to the *Kelly* decision. See *Kelly*, 397 So. 2d at

the legislature has avoided its duty.²⁷ Although consideration should be given to the effect of such a remedy on employers,²⁸ employees for an indefinite time in Mississippi continue to be subject to termination for any reason.²⁹

The failure of the Mississippi Supreme Court or the state legislature to act has doubtless subjected numerous Mississippians to coercion, duress, and other unconscionable acts.³⁰ Employees who realize that they possess no remedy if discharged for asserting their rights under the workers' compensation law are unlikely to file claims; thus, the legal rights of employees to obtain compensation are obviously completely subordinated.³¹ The state legislature has proven to be incapable of protecting the citizens of Mississippi from the harsh results of the employment-at-will rule and, for this reason, the Supreme Court of Mississippi should reconsider the *Kelly* decision and create an exception to the employment-at-will rule for the victims of retaliatory discharge based on the filing of a workers' compensation claim.³² This

877 n.2. The example was a statute enacted by the Texas legislature which read as follows:

Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Sec. 3. The district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act.

Id. (quoting TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1962 & Supp. 1978)). This appears to be a statute which would be fair to employer and employee alike since an employee discharged in violation of it would have the burden of proof but would be entitled to reinstatement and "reasonable" damages if successful in proving his case. See TEX. REV. CIV. STAT. ANN. art. 8307c, § 2 (Vernon 1962 & Supp. 1978).

²⁷ See *The Clarion Ledger*, *supra* note 26, at 12B, col. 3 (legislature failed to take action on proposed statute).

²⁸ See *Murg & Scharman*, *supra* note 11, at 331 (potential burden on employers of justifying discharge of employees is great); Note, *supra* note 8, at 233-34 (interests of employers, employees, and society should be balanced).

²⁹ See *supra* notes 22-25 and accompanying text.

³⁰ Note, *Mississippi Workmen's Compensation*, *supra* note 11, at 597-98.

³¹ *Id.*

³² Any state court which originally established a presumption of terminable-at-will employment can change that presumption to a policy favoring economic stability through continued employment. Blackburn, *Restricted Employer Discharge Rights: A*

would not alleviate the potential problem of federal preemption, which is discussed below, but it would provide relief for many Mississippians who need it.³³

III. THE DOCTRINE OF PREEMPTION

A. *The Constitutional Basis of Preemption*

An analysis of the effect of federal preemption on unjust discharge

Changing Concept of Employment at Will, AM. BUS. L.J. 467, 481 (1980).

The Mississippi Supreme Court has indicated a willingness to reconsider the continued validity of the employment-at-will rule. See *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985). In *Shaw*, the court enforced a specific provision of a contract of employment under which the employer terminated an employee with 26 years of service. *Id.* at 249. The court based this decision on the terms of the written contract itself which gave the employee the reciprocal right to quit by giving 10 days' notice. *Id.* at 249, 254-55. However, the court went on to state that, "[w]ere this a case where no employment contract established expressly the ground rules for termination and where the employer was calling upon the state to furnish the law which authorized termination, we might well be charged to reconsider the at will termination rule." *Id.* at 254. Apparently, the plaintiff in *Shaw* would have had a better chance of prevailing if his claim had not been supported by a written agreement.

It is possible that an argument could also be made under existing law to support a potential remedy for the wrongful discharge of Mississippi citizens without further action by either the legislature or the supreme court. While this comment was being prepared for publication, Mr. Franklin V. Anderson, a Jackson, Mississippi, attorney, contacted the *Mississippi Law Journal* and provided the suggestions which follow and for which the author expresses his gratitude.

State constitutional and statutory provisions now in existence could provide a potential remedy here in Mississippi. Section 191 of the Mississippi Constitution states that the "legislature shall provide for the protection of the employees of all corporations doing business in this state from interference with their social, civil, or political rights by said corporations, their agents or employees." MISS. CONST. art. 7, § 191. Additionally, § 79-1-9 of the Mississippi Code provides the following:

Any corporation doing business in this state shall be liable to a penalty of two hundred fifty dollars (\$250.00) for every unlawful interference with the social, civil, or political rights of any of its agents or employees, and the same may be recovered by suit, to be brought by the injured party.

MISS. CODE ANN. § 79-1-9 (1972 & Supp. 1985). Arguably, § 191 of the Mississippi Constitution could be interpreted as prohibiting the wrongful discharge of corporate employees in this state. Furthermore, the \$250 limitation on recovery currently set by § 79-1-9 might well be unconstitutional itself as denying a full recovery to wronged employees while providing nothing in return. In any event, it could certainly be argued under the constitution that many of the prevailing exceptions to the employment-at-will rule should apply to corporate employees in Mississippi as involving the violation of their "social, civil, or political rights." See MISS. CONST. art. 7, § 191; see also text accompanying notes 15-21.

³³ See *infra* notes 61-89 and accompanying text.

claims could not be made without first examining the doctrine of federal preemption and its constitutional basis. The preemption doctrine is based on the supremacy clause of the United States Constitution.³⁴ Preemption problems arise whenever state action conflicts with federal legislation or when the federal interest is so dominant that it precludes state interference.³⁵ It is the province of the courts to decide when preemption should be invoked absent express direction from Congress.³⁶

B. Preemption of State Labor Law

The doctrine of labor law preemption developed after the enactment of the National Labor Relations Act (NLRA) in 1935.³⁷ The NLRA is a comprehensive federal code which regulates virtually all labor relations in interstate commerce.³⁸ This Act preempts any state or local action which conflict with it.³⁹

³⁴ The supremacy clause states:

This constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

³⁵ Note, *Labor Law—Federal Preemption—National Labor Policy Does Not Preempt States From Paying Unemployment Insurance to Strikers*, 50 MISS. L.J. 499, 500-01 n.11 (1979). Preemption frequently occurs when Congress enacts legislation pursuant to the commerce clause and in conjunction with the supremacy clause. *Id.* Both the Fair Labor Standards Act and the Labor Management Relations Act were enacted pursuant to the power of Congress under the commerce clause. *See infra* note 37. The commerce clause states that: "The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several states, and . . . Indian tribes." U.S. CONST. art. 1, cl. 8.

³⁶ *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 3179, 3185 (1984).

³⁷ *See* 29 U.S.C. §§ 151-87 (Supp. 1984). In 1947, Congress supplemented the NLRA by enacting the Labor Management Relations Act (LMRA) in order to curb objectionable union activities. 29 U.S.C. §§ 141-44, 151-66, 171-87 (Supp. 1984); *see* H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 43 (1968) (LMRA prohibits many secondary boycotts and picketing formerly permitted under NLRA). *See generally* Machan, *Some Philosophical Aspects of National Labor Policy*, 4 HARV. J.L. PUB. POL'Y 67, 123-29 (1981) (history of NLRA and LMRA).

³⁸ *See* 29 U.S.C.A. §§ 151-87 (West 1973 & Supp. 1985); *see also* *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237-38 (1967) (stating that NLRA is to regulate labor relations in activities affecting interstate commerce); *Garner v. Teamsters Local 776*, 346 U.S. 485, 488-91 (1953) (same).

³⁹ *See supra* notes 35-37 and accompanying text (preemption is matter of legislative intent). *But see* Brody, *Labor Preemption Again—After the Searing of Garmon*, 13 SW. U.L. REV. 201, 201 n.2 (1982) (exceptions to labor preemption doctrine).

The decisions of the Supreme Court have included two doctrines for use in determining whether state-based law claims are preempted under the NLRA: the supremacy clause principle and the primary jurisdiction theory.⁴⁰ The supremacy clause principle mandates the preemption of state laws which directly conflict with federal law.⁴¹ The primary jurisdiction theory which was set out in *San Diego Building Trades Council v. Garmon*⁴² presumptively preempts state regulations and causes of action if they concern conduct that is actually or arguably prohibited or protected by the NLRA.⁴³ The Court in *Garmon* stated, however, that preemption was not mandatory and would not be applied if the regulated activity was merely a *peripheral* concern of the NLRA or touched interests so deeply rooted in local feeling that, in the absence of "compelling Congressional direction," it would not be inferred that Congress intended the states to be deprived of the power to act.⁴⁴

⁴⁰ See *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 3179, 3186-87 (1984); *Peabody Galian v. Dollar*, 666 F.2d 1309, 1314 (10th Cir. 1982). The primary jurisdiction theory is a rule which avoids the potential for jurisdictional conflict between state courts and agencies and the National Labor Relations Board (NLRB) by ensuring that the primary responsibility for interpreting and applying federal labor law remains with the NLRB. *Brown*, 104 S. Ct. at 3186-87; *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-89 (1971).

⁴¹ See *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 3179, 3186-87 (1984) (discussing supremacy clause principle); *Free v. Bland*, 369 U.S. 663, 666 (1962) (stating that state law which is contrary to federal law must yield). Preemption here is, thus, by direct operation of the supremacy clause. *Id.*

⁴² 359 U.S. 236 (1959).

⁴³ *Id.* at 244-47. One oft-quoted holding of the Court is as follows:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id. at 244. Another significant statement made by the *Garmon* Court is this observation: When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245.

Later cases have elaborated on these frequently quoted statements made by the *Garmon* Court. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981); *Vaca v. Snipes*, 386 U.S. 171, 178-79 (1967).

⁴⁴ *Garmon*, 359 U.S. at 243-44. The opinion was somewhat confusing and susceptible to differing interpretations, but subsequent decisions have served to clarify it. See *infra*

A second line of analysis under the primary jurisdiction theory was developed by the Court in *Local 20 Teamsters Union v. Morton*⁴⁶ and refined in *Lodge 76, Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.⁴⁷ In *Morton*, the Court ruled that an Ohio law prohibiting secondary boycotts should be preempted because otherwise the Congressional determination to leave such boycotts unregulated would be frustrated.⁴⁷ In *Machinists*, the Court clarified this rule by holding that a state could not intervene in a concerted refusal to work overtime because such a refusal was an economic weapon that Congress intended to be left to the free and unregulated interplay of the relative economic strength of management and union.⁴⁸

The primary jurisdiction theory was apparently further modified by the Court in *Farmer v. Carpenters*.⁴⁹ The plaintiff in *Farmer* brought an action in state court for the intentional infliction of mental distress. The action was not preempted even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice.⁵⁰ The Court stated that the *Garmon* analysis was to be

notes 45-60 and accompanying text. The Court contradicted itself when it definitely stated that since the conduct was arguably covered by the NLRA, but the NLRB had declined to address the case, then the Court had no power to decide whether it was covered. *Garmon*, 359 U.S. at 244-48. The Court did, at least, make clear that state jurisdiction would not be preempted in situations where the conduct of the activity concerned was marked by violence and imminent threats of public disorder. *Id.* at 248. Justice Harlan concurred in the opinion but criticized the Court on this issue by stating that the holding in this case would henceforth require the states to withhold access to their courts until the NLRB ruled on a given labor case. *Id.* at 253 (Harlan, J., concurring). A fair reading of *Garmon* indicates that Justice Frankfurter did a poor job in writing the opinion since it appears to say that the NLRB had to rule on any case before the state court could consider it, as Justice Harlan observed, while subsequent cases have supported a different interpretation allowing the states to regulate where activity was merely a peripheral concern of the NLRA. See *infra* notes 45-60 and accompanying text.

⁴⁶ 377 U.S. 252 (1964).

⁴⁷ 427 U.S. 132 (1976).

⁴⁸ *Morton*, 377 U.S. at 259.

⁴⁹ *Machinists*, 427 U.S. at 138-42; see Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 278 (1980)(discussing *Machinists*). The rule as stated in *Machinists* is a refinement of the one stated in *Morton* and mandates the preemption of any activity which Congress has determined should be left to the "free play of economic forces." *Machinists*, 427 U.S. at 140; see also *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)(whether Congress intended that conduct be left to "free play of economic forces" is crucial inquiry of preemption analysis). See generally F. PENN & L. BLACK, *DEVELOPING LABOR LAW* 83-87 (1977)(discussing *Morton* and *Machinists*).

⁵⁰ 430 U.S. 290 (1977). Arguably, *Farmer* is more an exception than a general modification of *Garmon*. See *infra* note 51.

⁵¹ *Farmer*, 430 U.S. at 301-07. The plaintiff was a carpenter and a member of the

applied as a balancing test where conduct was arguably covered by the NLRA so that the state's legitimate nonlabor interests in regulating the activity in a given case would be balanced against the federal government's interests in uniform labor regulation and the likely degree of interference with those interest.⁵¹

Another important case dealing with labor preemption is *Sears, Roebuck, & Co. v. Carpenters*.⁵² *Sears* involved the granting of an injunction by a state court against union members picketing on the plaintiff's property.⁵³ In ruling that the issuance of the injunction should not be preempted,⁵⁴ the Court stated that, insofar as the conduct was arguably prohibited, the critical inquiry to be made was whether the issue presented to the state court was *different* from that which would be presented to the NLRB.⁵⁵ The Court then added as

United Brotherhood of Carpenters and Joiners of America. *Id.* at 292. He alleged that the union had subjected him to a campaign of personal abuse and harassment. In addition, his allegations included discrimination in referrals from the hiring hall as a result of his complaints about the hiring hall operations. *Id.* The Court stated that these allegations of conduct might form the basis for unfair practice charges before the board. *Id.* at 299.

⁵¹ *Id.* at 297-301; see *Gould v. Wisconsin Dep't of Indus.*, 576 F. Supp. 1290, 1294 (1983)(described effect of *Farmer* on *Garmon*). The Court in *Farmer* clarified the *Garmon* decision by holding that whenever a state sought to regulate conduct which was arguably covered by the NLRA, it would be necessary to balance the interests of the state against the national labor policy and to avoid preemption in those actions where the state interest was very great. *Farmer*, 430 U.S. at 296-301. The *Farmer* Court commented that in order for the concurrent state court jurisdiction allowed in *Farmer* to be allowed in other cases either "outrageous" conduct would have to be present or the conduct would have to be unrelated to the employment discrimination. *Id.* at 305; cf. *Linn v. Plant Guard Workers*, 383 U.S. 53, 66-67 (1966)(facts same as *Farmer* except plaintiff was supervisor with no cognizable NLRA claim (defamation)—not preempted); *Carter v. Sheet Metal Workers*, 724 F.2d 1472, 1476-77 (1984)(state action for emotional distress which is merely incident to alleged discrimination rather than unrelated to it or a product of particularly abusive manner of discrimination should be preempted).

⁵² 436 U.S. 180 (1978).

⁵³ *Id.* at 182-83.

⁵⁴ *Id.* at 197-208.

⁵⁵ *Id.* at 197. The Court specifically stated the following:

The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Id. The Court stated that if *Sears* had filed a charge to the NLRB, the federal issue

additional justification for its ruling that, insofar as the conduct was arguably protected, the primary jurisdiction rationale did not extend to cases in which an employer had no acceptable method of invoking or inducing a union to invoke the jurisdiction of the NLRB.⁵⁶

The Supreme Court has rendered opinions on labor preemption in several subsequent cases, but there have been no significant changes in the primary jurisdiction theory.⁵⁷ In 1983, the Court reaffirmed *Sears* in *Belknap, Inc. v. Hale*,⁵⁸ by using the same application of the preemption doctrine and holding that permanent replacements who were discharged to provide positions for returning strikers could sue for re-

would have been whether the picketing had a recognitional or work reassignment objective. In the state court action *Sears* only challenged the location of the picketing. *Id.* at 198. The Court concluded that allowing *Sears* to adjudicate its trespass claim in state court would create no realistic risk of interference with the NLRB's primary jurisdiction. *Id.*

⁵⁶ *Id.* at 201-03. The Court concluded that the primary jurisdiction rationale did not require preemption of state jurisdiction of conduct arguably protected by the NLRA where, as in *Sears*, the party who could have presented the issue to the board would not do so and the other party to the dispute had no acceptable means of doing so. *Id.* at 202-03. See Brody, *supra* note 39, at 211 (discussing the impact of *Sears*). The Court stressed that conduct which was obviously covered by the NLRB should be preempted. *Sears*, 436 U.S. at 202. But see *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 3179, 3187, 3192 (1984) (New Jersey's regulation of qualifications of casino industry union officials not preempted since state law regulating conduct actually prohibited by federal law must be preempted).

⁵⁷ In 1978, the Court ruled that a state could pay unemployment compensation to strikers even though the payments were likely to have substantial effects on the relative bargaining power of management and union. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 546 (1978); see also *Local 926 v. Jones*, 460 U.S. 669, 681-84 (1983) (action for tortious interference with contractual rights preempted). See generally Comment, *Constitutional Law—Preemption—Preemption of State Labor Law by National Labor Relations Act—New York Telephone Company v. New York State Department of Labor*, 26 N.Y.L. SCH. L. REV. 855, 855-56, 867-84 (1981) (analyzing *New York Telephone*); Note, *Labor Law—Federal Preemption—State Payment of Unemployment Compensation to Strikers Upheld*, 63 MARQ. L. REV. 331, 331-32, 335-48 (1979) (same); Note, *supra* note 37, at 510-12 (same). The preemption analysis in *New York Telephone* was somewhat unusual as it relied to a great extent on a determination that Congress had intended to leave the states with wide discretion in dealing with unemployment compensation under the Social Security Act of 1935. *New York Telephone*, 436 U.S. at 538-41. It would appear to have little precedential value in the area of preemption.

⁵⁸ 463 U.S. 491 (1983). In *Belknap*, strike replacements who were displaced by reinstated workers sued their employer in state court for breach of contract. *Id.* at 493. The Court ruled that the suit was not preempted based on the determination that the controversy presented to the state court (the rights of replacement employees under state law) was different from that which would face the NLRB (the rights of strikers under federal law). *Id.* at 510-12.

covery in state court.⁵⁹ There have been no recent United States Supreme Court decisions which have *directly* addressed the preemption of state wrongful discharge actions by federal labor law.⁶⁰

C. Preemption of State Claims Based on Exceptions to the Employment-at-Will Rule

The preemption of state-based wrongful discharge actions by federal law ordinarily occurs when employers raise preemption as a defense to such actions.⁶¹ The employers generally remove⁶² the cases to federal court on the basis that the employees' actions are covered by the provisions of collective bargaining agreements and are therefore governed by federal law.⁶³ The employers circumvent the requirements of the well-pleaded complaint rule by arguing artful pleading on the

⁵⁹ *Id.* at 498-512. *See supra* notes 47-63 and accompanying text. The Court followed the traditional preemption analysis as established by *Garmon* and *Machinists*. *Id.* at 498-99. The employer argued that the *Machinists* rationale foreclosed the state court action. *Id.* at 507. The Court disagreed, however, and, citing *Sears*, ruled that the state court action was not preempted since it was *different* from that which would be presented to the NLRB. *Id.* at 509-11.

⁶⁰ *See infra* notes 90-99 and accompanying text; *see also* Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc., 106 S. Ct. 1057, 1061-62 (1986) (discussing preemption doctrine).

⁶¹ *See, e.g.*, *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1471, 1476 (9th Cir. 1984) (wrongful discharge action removed to federal court and preempted); *Schaeffer v. General Motors Corp.*, 586 F. Supp. 870, 871 (E.D. Mich. 1984) (employer unsuccessfully moved to remove wrongful discharge action to federal court alleging preemption proper).

⁶² Federal law allows removal on the basis of either diversity or federal question jurisdiction:

Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441 (1978 & Supp. 1985). *See infra* note 64 and accompanying discussion of the well-pleaded complaint rule.

⁶³ Jurisdiction of suits involving collective bargaining agreements is based on the "arising under" requirement of 28 U.S.C. § 1337 (1978 & Supp. 1984) and § 301 of the LMRA which provides the following:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1978 & Supp. 1985).

part of the employees.⁶⁴ The employers then request dismissal on the basis that the employees failed to exhaust their remedies under the grievance procedures of their collective bargaining agreements.⁶⁵ The result is that employees are frequently left without a remedy because of the running of the statute of limitations.⁶⁶

The Supreme Court first considered the question of whether or not a state-based claim for wrongful discharge should be preempted in *Local No. 207, International Association of Bridge, Structural and Ornamental Ironworkers Union v. Perko*.⁶⁷ The plaintiff in *Perko* had alleged that his union had conspired to deprive him of his occupation.⁶⁸ The Court relied on *Garmon* and stated that the claim was arguably within the jurisdiction of the NLRB and should be preempted.⁶⁹

In 1983, the Supreme Court again considered wrongful discharge claims in *Local 926 International Union of Operating Engineers v. Jones*.⁷⁰ The plaintiff in *Jones*, who was covered by a collective bargaining agreement, filed a charge with the regional director of the NLRB but, instead of appealing the adverse determination of that charge to the General Counsel, later filed a state claim.⁷¹ In reaching a decision, the Court, relying on *Perko*, *Garmon*, and *Sears*,⁷² ruled that

⁶⁴ Under the well-pleaded complaint rule, federal jurisdiction is not created when a cause of action is preempted because preemption is a defense and not an element of the complaint. *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1472 (9th Cir. 1984). However, when a court determines that a complaint is "artfully pleaded" to avoid federal jurisdiction, the court may look beyond the face of the pleadings to the nature of the claim and characterize it as arising under federal law. *Id.* at 1472-73.

⁶⁵ *Id.* at 1472. If an employee wishing to assert a grievance fails to pursue his remedies as provided in a collective bargaining agreement and seeks relief directly in court, then his claim will ordinarily be dismissed on the grounds of failure to exhaust his contractual remedies. *Id.* If an employee can show that he was not fairly represented by his union, however, he is then entitled to pursue his claim in court. *Id.* (citing *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965)).

⁶⁶ *Majewski v. B'nai B'rith Intern.*, 721 F.2d 823, 824 n.3 (D.C. Cir. 1983); see also *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281, 2293 (1983) (grievants have six months to bring § 301 actions under the LMRA after exhausting other remedies). See generally Symposium, *Exhausting Internal Union Grievance Procedures Prior to Filing a Federal Claim*, *Annual Survey of Labor Law*, 24 B. C. L. REV. 134, 134-45 (1982).

⁶⁷ 373 U.S. 701 (1963).

⁶⁸ *Id.* at 702-03.

⁶⁹ *Id.* at 706-08. This case is obviously of little use in determining how the Supreme Court would rule on such facts now since it was rendered before the preemption doctrine had been fully developed. See *supra* notes 42-60 and accompanying text.

⁷⁰ 460 U.S. 669 (1983).

⁷¹ *Id.* at 672-73.

⁷² *Id.* at 680-81. Justice Rehnquist filed a vigorous dissent in which he argued that

the claim was preempted because it was *identical* to the claim which would have been presented to the NLRB.⁷³

In recent years, a number of lower federal court decisions have been rendered regarding the preemption of wrongful discharge claims. In *Eitmann v. New Orleans Public Service, Inc.*,⁷⁴ the Fifth Circuit ruled that a plaintiff's wrongful discharge claim had been preempted by federal law.⁷⁵ The plaintiff had based his state claim on an alleged oral promise of his employer to retain him at full pay in the event of his incurring a disabling work-related injury.⁷⁶ After his discharge, the plaintiff invoked the first two steps of the grievance process provided by the collective bargaining agreement, but abandoned the procedure before it was completed.⁷⁷ Despite the plaintiff's allegation that his claim was independent of the collective bargaining agreement,⁷⁸ the court ruled that the plaintiff's claims were subject to the terms of the collective bargaining agreement and should be preempted.⁷⁹

In *Olguin v. Inspiration Consolidated Copper Co.*, another recent case, the United States Court of Appeals for the Ninth Circuit ruled that a suit filed in state court for wrongful discharge should be preempted.⁸⁰ The plaintiff in *Olguin* had filed a complaint in state court for wrongful discharge which was removed to federal court.⁸¹ The court

the majority was in error for relying on *Perko* because the Court's preemption analysis had changed since *Perko* where the mere fact that a state claim was based on arguably prohibited conduct was sufficient to mandate preemption. *Id.* at 685 n.2 (Rehnquist, J., dissenting).

⁷³ *Id.* at 681-82. Justice Rehnquist in dissent argued that the majority had misapplied the *Sears* test by ruling that the plaintiff's state-based breach of contract claim was identical to the question of whether or not his discharge was coerced which was the issue that the NLRB would have addressed. *Id.* at 685-89 (Rehnquist, J., dissenting). He concluded with seemingly reasonable arguments that identical means identical and that the mere risk of differing factual determinations by the NLRB and state courts was insufficient justification to require preemption. *Id.* at 688-92.

⁷⁴ 730 F.2d 359 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1172 (1985).

⁷⁵ *Eitmann*, 730 F.2d at 367.

⁷⁶ *Id.* at 361.

⁷⁷ *Id.*

⁷⁸ *Id.* The plaintiff had claimed that his alleged oral contract of continued employment was different from the claim he would have had based on a breach of the terms of the collective bargaining agreement. *Id.*

⁷⁹ *Id.* at 364. The court relied on *Belknap*, 491 U.S. at 510-12, but distinguished its results on the facts. *Eitmann*, 730 F.2d at 364. The court stated that the NLRB would have been unable to grant relief in *Belknap* but that it could do so in *Eitmann* and that this difference was the critical factor in the determination. *Id.*

⁸⁰ 740 F.2d 1468 (9th Cir. 1984). *See supra* notes 64, 65 (use of preemption as defense in *Olguin* and other cases).

⁸¹ *Olguin*, 740 F.2d at 1470-71. The plaintiff had previously received a \$1,000 settle-

ruled that the plaintiff's alleged right not to be dismissed without just cause was essentially equivalent to a right created by the collective bargaining agreement and should be preempted.⁸²

Prior to the decision in *Olguin*, the Ninth Circuit held that a wrongful discharge claim was not preempted in *Garibaldi v. Lucky Food Stores, Inc.*⁸³ *Garibaldi* involved the retaliatory discharge of an employee who reported a shipment of adulterated milk to state health authorities after his supervisors ordered him to deliver it.⁸⁴ The court determined that the issue of whether a claim for wrongful discharge based on the violation of state public policy was preempted by the NLRA was one of first impression.⁸⁵ The court, relying on several decisions including *Farmer* and *Sears*, ruled that the state interests involved were peripheral in nature and did not interfere with the collective bargaining process. Therefore, the court held that the state's interest in protecting the health and well-being of its citizens was so great that preemption should not be applied to the claim.⁸⁶ Other

ment from his employer based on a discrimination complaint he had filed with the Mine Safety and Health Administration (MSHA) in which he alleged that his discharge was in retaliation for the filing of a safety complaint. *Id.*

⁸² *Id.* at 1474. The court took great care to carefully distinguish *Olguin* from *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984). *Olguin*, 740 F.2d at 1474. The Ninth Circuit had determined in *Garibaldi* that a wrongful discharge claim based on the state's interest in enforcing health regulations was not preempted. *Garibaldi*, 726 F.2d at 1374. The court distinguished *Olguin*, however, on the basis that the plaintiff's alleged discharge in *Garibaldi* had resulted from complaints about activities protected by federal labor laws and not state laws. *Olguin*, 740 F.2d at 1475; see also *Oglesby v. RCA Corp.*, 752 F.2d 272, 276-78 (7th Cir. 1985)(preemption of state claim alleging wrongful discharge shown to be violative of collective bargaining agreement).

Bringing a wrongful discharge claim in state court which is subject to federal preemption due to its being within the terms of a collective bargaining agreement would be comparable to bringing a state court action against a former employer on the grounds that a discharge was in violation of the provisions of a collective bargaining agreement. Wrongful discharge claims such as the latter apparently are always preempted. See, e.g., *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1214 (9th Cir. 1980)(preemption proper where claim covered by provisions of collective bargaining agreement); *Brown v. United Parcel Serv.*, 560 F. Supp. 146, 149-50 (E.D. Va. 1982)(same); *Sklios v. Brotherhood of Teamsters*, 503 F. Supp. 123, 124-25 (N.D. Cal. 1980)(same).

⁸³ 726 F.2d 1367 (9th Cir. 1984).

⁸⁴ *Id.* at 1368. The plaintiff exhausted the grievance procedures under the collective bargaining agreement covering him before he filed his suit. *Id.* at 1369.

⁸⁵ *Id.* at 1371.

⁸⁶ *Id.* at 1372-76. The court stated that the prior arbitration did not serve as a barrier because the state claim was not preempted. *Id.* at 1376. Obviously, if the state claim had been preempted, then arbitration under the terms of the collective bargaining agreement would have barred the plaintiff from bringing a claim in federal court.

lower court decisions have been rendered in which state-based wrongful discharge claims were also held not to have been preempted. *Galion v. Dollar*⁸⁷ involved a plaintiff who brought a state claim which alleged that he was wrongfully discharged for filing a workers' compensation claim.⁸⁸ The court determined that the discharge of workers for filing workers' compensation claims was not preempted because such conduct had nothing to do with collective bargaining or union organization and, thus, had no tendency to conflict with federal labor law.⁸⁹

IV. THE FUTURE OF WRONGFUL DISCHARGE CLAIMS

A. *The Impact of Allis-Chalmers Corp. v. Lueck*

The apparent trend by some lower federal courts in favor of allowing at least some state wrongful discharge actions to proceed despite the specter of federal preemption is to be commended.⁹⁰ This trend represents a recognition on the part of the federal judges rendering these decisions that mistreated employees deserve the maximum protection afforded by either state or federal law and that this protection should not be denied by the arbitrary application of the doctrine of federal preemption to wrongful discharge actions.⁹¹ Unfortunately, the decision of the United States Supreme Court in *Allis-Chalmers Corp. v. Lueck*⁹² may have ended this trend.

Allis-Chalmers involved a claim by a worker alleging bad-faith handling of an insurance claim in connection with a disability insurance plan included in a collective-bargaining agreement.⁹³ The specific

⁸⁷ 666 F.2d 1309 (10th Cir. 1982).

⁸⁸ *Id.* at 1311-12. The defendant employer argued that the plaintiff's grievance arose under the terms of a collective bargaining agreement and that the plaintiff was bound by contract to pursue the exclusive remedy of arbitration. *Id.* at 1312-13.

⁸⁹ *Id.* at 1316-24; see also *Schaeffer v. General Motors Corp.*, 586 F. Supp. 870, 873 (E.D. Mich. 1984)(employer may not assert federal preemption as defense to state tort wrongful discharge action where discharge was for pursuing workers' compensation claim). But cf. *Taylor v. St. Regis Paper Co.*, 560 F. Supp. 546, 549 (C.D. Cal. 1983)(state action for wrongful discharge for pursuing workers' compensation claim preempted where plaintiff failed to file claim with state labor board). The distinction between *Taylor* and *Galion* appears to be that the plaintiff in *Taylor* sought to use the collective bargaining agreement to support his claim, but the court did not specifically address this point. *Id.* at 548. In fact, the opinion disposed of the issue concerning workers' compensation in a very perfunctory manner near the end of the opinion. See *id.* at 549.

⁹⁰ See *supra* notes 83-89 and accompanying text.

⁹¹ See *supra* notes 61-82 and accompanying text.

⁹² 105 S. Ct. 1904 (1985).

⁹³ 105 S. Ct. at 1908-09. The plaintiff, an employee of Allis-Chalmers, sued both Allis-Chalmers and Aetna Life & Casualty Company, which administered a group health

issue addressed by the Court was whether the Labor Management Relations Act preempted a state-law tort action for bad-faith delay in making disability payments provided under the terms of a collective bargaining agreement.⁹⁴ The Court held that such an action is preempted since it is "substantially dependent upon analysis of the terms of an agreement" made between the parties to a labor contract.⁹⁵ In what may be mere dicta, the Court intimated that claims for "unfair discharge" should also be preempted under similar circumstances.⁹⁶

insurance plan funded by Allis-Chalmers. *Id.* The insurance claim arose out of a non-occupational back injury the plaintiff suffered while carrying a pig to a friend's house for a pig roast. *Id.* at 1908. Despite the fact that the plaintiff and Allis-Chalmers were parties to a collective bargaining agreement which provided for a four-step grievance procedure culminating in final and binding arbitration, the plaintiff never attempted to grieve his dispute concerning the manner in which his disability claim was handled by Allis-Chalmers and Aetna. *Id.* Instead, he brought a bad-faith tort claim in Wisconsin state court. *Id.*

⁹⁴ *Id.* at 1909. The Court granted certiorari to determine specifically "whether § 301 of the Labor Management Relations Act preempts a state-law tort action for bad-faith delay in making disability-benefit payments due under a collective-bargaining agreement." *Id.*

⁹⁵ *Id.* at 1916. The Court stated that the Wisconsin Supreme Court's conclusion that the bad faith tort claim was independent of the underlying contract claim was erroneous. *Id.* at 1914-15. The Court stated that the implied duty to act in good faith was no different from the explicit contractual duty to pay, which was admittedly covered by the Labor Management Relations Act, because the extent of either duty ultimately depended on the interpretation given to the contractual agreement between the parties. *Id.* The test applied by the Court in order to reach this result was apparently that whenever the "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 1916. Thus, preemption under *Allis-Chalmers* appears to be based on the notion that § 301 of the LMRA, together with a collective bargaining agreement, forces a worker to rely on the grievance procedures mandated under the collective bargaining agreement and preempts inconsistent state remedies. *See id.* Compare the preemption of conduct "arguably prohibited" by the NLRA and, thus, within the jurisdiction of the NLRB. *See supra* notes 67-73 (discussing *Perko*, *Jones*, and other decisions in this context).

Obviously, this test would be likely to apply to wrongful discharge actions wherever a collective bargaining agreement covered a worker and contained provisions relating to the termination of such workers.

⁹⁶ *Id.* at 1915-16. The Court made the following observation:

Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to preempt such claims. Claims involving vacation or overtime pay, work assignments, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an

The action taken by the Supreme Court in *Allis-Chalmers* is disturbing to say the least. Until that decision, the federal courts of appeal had been following a trend which disallowed preemption of some wrongful discharge claims despite the presence of collective bargaining agreements.⁹⁷ Now, whether a state-based wrongful discharge action will be preempted is more uncertain than ever before, but the result in many cases remains very certain—individuals who pursue state-created rights in state court rather than asserting a less effective remedy under an applicable collective bargaining agreement are left with no remedy at all.⁹⁸ These individuals are left without a remedy either because their rights to arbitration were exhausted or their compensation claims were denied by the NLRB so that they no longer had any federal claim remaining. Furthermore, after their state claims were preempted, those claimants who failed to exercise their rights under applicable provisions of collective bargaining agreements often found that they were barred from doing so later under limitations provisions of such agreements. This deprivation is not just!⁹⁹

B. Proposals to Remedy Deficiencies in the Law

The federal courts should adopt a more lenient attitude toward individuals who are left with no remedy when their wrongful discharge claims are preempted. The courts should realize that many of these people act in good faith and on the advice of counsel in bringing these actions and deserve better treatment. After the courts determine that preemption of a wrongful discharge claim is proper in a given case, they should make a further inquiry concerning whether the plaintiff acted in good faith in pursuing the state remedy. If a court does determine that a plaintiff acted in good faith, it should then use its general

individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. (emphasis added). This passage is arguably mere dicta, but, when considered in conjunction with the remainder of the opinion, it will likely one day carry the force of law. See *supra* note 95 (discussing the effect of *Allis-Chalmers*).

⁹⁷ See *supra* notes 61-89 and accompanying text (discussing potential effect of *Allis-Chalmers*). These courts now appear to be blindly preempting all wrongful discharge claims involving collective bargaining agreements. See *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345-46, 348 (7th Cir. 1985) (state-based wrongful discharge claim held preempted under *Allis-Chalmers* since covered by terms of collective bargaining agreement); *Malone v. Kitchens of Sara Lee*, 613 F. Supp. 1074, 1075 (N.D. Ill. 1985) (same).

⁹⁸ See *supra* note 96 (discussing the uncertainty created by *Allis-Chalmers*).

⁹⁹ See *supra* notes 62-89 and accompanying text.

equitable powers to allow the state claim to be litigated or at least rule that the plaintiff be allowed to pursue any available claim before the NLRB or through arbitration. This would mitigate the obviously unjust result which all too often prevails today when such plaintiffs are left with no remedy whatsoever.¹⁰⁰

The Supreme Court could still neutralize the disturbing dicta¹⁰¹ in *Allis-Chalmers* and allow parties to collective bargaining agreements to avail themselves of the rights afforded to their nonunionized fellow workers under state law.¹⁰² If the Court is unwilling to do this, however, there is another solution. Congress could enact a uniform national remedy for wrongful discharge.¹⁰³ Such a law would not only have the benefit of ensuring equality of treatment of union and nonunion work-

¹⁰⁰ Arguably, since unionized employees alone are affected by preemption of these wrongful discharge claims, and since they are in a better position to negotiate rights with employers through their unions than ordinary workers, they should need no additional protection. At least one writer has supported this position. Note, *A Common Law Action for the Abusively Discharged Employee*, 26 *HAST. L. J.* 1435, 1463 (1975). This position is probably wrong, however, considering the inherent unfairness of allowing a remedy provided by state law to one group of citizens and depriving another group based on the perception that they possessed a potentially superior bargaining position.

¹⁰¹ See *supra* note 96 and accompanying text.

¹⁰² See *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380, 2384 (1985) ("the presumption is against preemption").

¹⁰³ See Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 *J. URB. L.* 351 (1984). Decker's article did not consider at length the ramifications of the application of federal preemption in this context. Additionally, his proposed statute was extremely lengthy and comprehensive. See *id.* at 364-70. It is submitted that there is no need for such complexity and that the Texas statute approved of by the Mississippi Supreme Court in *Kelly v. Mississippi Valley Gas Co.* would serve equally as well if its wording were modified to allow a remedy for all wrongful discharge actions and not merely those instances in which discharge was in retaliation for the filing of a worker's compensation claim. See *supra* notes 23, 26. The revised statute might read as follows:

Section 1. No person may discharge or in any other manner discriminate against any employee unless that person has just cause to do so based on the ability or conduct of the employee or because of the requirements of the employer.

Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Section 3. The District Courts of the United States shall have jurisdiction, for cause shown, to restrain violations of this Act.

Cf. Decker, *supra*, at 364-70 (text of proposed statute). With this minimal guidance by Congress, it could be left to the federal courts to develop specific guidelines for the application of the statute.

ers but would have the added benefit of affording a remedy to the citizens of states such as Mississippi who are still subject to the employment-at-will rule.¹⁰⁴ This would represent the use of the doctrine of federal preemption as it should be used—to provide greater protection to those who are in need rather than denying them even the protection afforded by their states in the name of freedom of contract.¹⁰⁵

V. CONCLUSION

The employment-at-will doctrine has outlived its usefulness. Many states have begun to recognize exceptions to this doctrine but the citizens of states such as Mississippi continue to have to live with it.¹⁰⁶ Furthermore, even employees in states which recognize these exceptions almost always lose their right to a claim for wrongful discharge due to federal preemption if they are covered by the terms of a collective bargaining agreement.¹⁰⁷

The solutions to these problems are simple. It is submitted that the Mississippi Legislature should take immediate steps to enact a statute providing a remedy for wrongful discharge or that the Mississippi Supreme Court should abrogate the employment-at-will doctrine itself and recognize a common-law cause of action for wrongful discharge.¹⁰⁸ The United States Supreme Court could in turn do its part by recognizing the need for such actions and refusing to allow preemption in cases where the discharged employee was covered by the terms of a collective bargaining agreement. Furthermore, the Congress of the United States could provide the ultimate solution by enacting a law providing for a uniform national remedy for wrongful discharge.

Weyman Williams McCranie, Jr.

¹⁰⁴ See *supra* notes 22-33 and accompanying text.

¹⁰⁵ See *Allis-Chalmers*, 105 S. Ct. at 1910-14 (discussing the contractual nature of claims based on wrongful discharge).

¹⁰⁶ See *supra* text accompanying notes 15-33.

¹⁰⁷ See *supra* text accompanying notes 61-89.

¹⁰⁸ See *supra* text accompanying notes 30-33.

OIL & GAS: USE OF THE "SUBJECT TO" CLAUSE IN MISSISSIPPI MINERAL CONVEYANCING

I. INTRODUCTION

Mississippi oil and gas lawyers have recently been handed the tail of a tiger. Due to the holding of *Miller v. Lowery*,¹ these practitioners are befuddled as to when, where, and how (if ever) a land conveyance made "subject to" a reservation of all oil, gas, and minerals will effectively reserve those stated interests from the conveyance.² The *Miller* decision not only implicates Mississippi's decisional law concerning "subject to" clauses in land conveyances, but also affects a myriad of other issues involving the construction of deeds which purport to reserve or except minerals from a conveyance. Questions arising as a result of the *Miller* decision include the following:

(1) Whether or not, in mineral deed construction, the term "subject to" is considered the equivalent of the term "reservation" or "exception";

(2) Under what circumstances a reservation or exception, be it effected by traditional wording or via a "subject to" clause, will act to sever the stated mineral interest from the fee conveyed;

(3) Whether reservation language or a "subject to" clause erroneously referring to nonexistent prior grantors or nonexistent or invalid prior reservations or conveyances will prohibit the described mineral interest from passing to the grantee; and

(4) Under what circumstances extrinsic evidence and construction rules will be applied when a court confronts a questioned "subject to" clause which purportedly reserves a mineral interest.

The scope of this comment will encompass an examination of Mississippi decisional law concerning these issues with a focus on Mississippi's interpretation of "subject to" clauses as used in reservations or

¹ 468 So. 2d 865 (Miss. 1985).

² The authors of this comment attended a September 1985 meeting of the Mississippi Oil and Gas Lawyers Association wherein the sole topic of debate was the ramifications of the *Miller* decision. The discussions were marked by the pervasive confusion which has arisen from the *Miller* court's application of Mississippi law to the concepts discussed in this paper.

exceptions of mineral interests in fee simple conveyances. However, this discussion does not encompass those "subject to" clauses which refer to outstanding mineral *leases*, since the issue of whether such clauses reserve or except the described interest from the leasehold is typically not a dominant question. In those cases, the clause usually serves as a protection of the grantor's warranty.³

In general, when examining a deed which states that a conveyance is made "subject to" a described mineral interest, courts in various jurisdictions have taken differing positions regarding the meaning and effect of these "subject to" clauses. Some jurisdictions hold that these clauses merely evidence an intent to protect the grantor's warranty as to the interest described in and referred to by the "subject to" language.⁴ Conversely, other jurisdictions have held that the "subject to" clause evidences a clear intent that the mineral interest described therein should not pass to the grantee, and, as such, the clause is treated as a reservation or exception notwithstanding the inartful language employed to effect the "reservation" or "exception."⁵

³ See 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 340-340.5 (1983)(purpose of inserting "subject to" clause in deed where mineral lease is outstanding is to protect grantor against breach of warranty arising from lease) [hereinafter referred to as WILLIAMS & MEYERS]; see also *LeSage v. Ellerbee Builders, Inc.*, 424 So. 2d 282, 283 (La. App. 1983) (sale of land "subject to mineral lease of record" did not have effect of reserving mineral rights in favor of vendors). For a detailed discussion of "subject to" clauses which refer to outstanding leases, see Smith, *The Subject To Clause*, 30 ROCKY MTN. MIN. L. INST. § 15.01 (1984)(principle function of "subject to" clause is to protect grantor against claim for breach of warranty) [hereinafter referred to as Smith]. But see *Bounds v. Ohio Oil Co.*, 234 Miss. 277, 284-85, 106 So. 2d 66, 68-69 (1958)(where deed was "subject to" lease which was void, it was held that "subject to" language showed intent not to convey described interest; therefore, treated as reservation).

⁴ See, e.g., *Murray v. United States*, 291 F.2d 161, 162 (8th Cir. 1961)("subject to" language designed solely to protect grantor's warranty); *Long-Bell Petroleum Co. v. Tritico*, 216 La. 426, 43 So. 2d 782, 786 ("subject to" evidenced no intent to reserve mineral interest from grant); *French v. Querbes*, 200 La. 654, 8 So. 2d 631, 635 (1942)("subject to" statement intended to protect grantors as warrantors); *Kokernot v. Caldwell*, 231 S.W.2d 528, 531 (Tex. Civ. App. 1950)("subject to" necessary to protect grantors from breaching warranty clause). See generally Smith, *supra* note 3, § 15.01 at 15.2 (where conveyance of land or interest is made when partial mineral interest is already outstanding, principal function of "subject to" clause is to protect grantor against claim for breach of warranty).

⁵ See, e.g., *Union Oil Co. v. Colglazier*, 360 So. 2d 965, 967-68 (Ala. 1978)("subject to" stands on its own as exception if no other deed is incorporated by reference); *Kelly v. Haas*, 262 S.W.2d 687, 688 (Ky. 1953)("subject to . . . all mineral rights" effective to reserve mineral rights to grantor); *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18, 21 (1965)(clause which stated conveyance was "subject to" one-half of all minerals effected a reservation of one-half of all minerals to grantor; clause was not merely warranty pro-

These divergent positions are often precipitated by imprecise draftsmanship.⁶ Occasionally, however, the dispute over the meaning of the clause arises as a result of the location of the clause within the deed. If the "subject to" clause is situated in the warranty provision, the clause is more likely to constitute a mere limitation on the warranty.⁷ If, however, the "subject to" clause is situated in the granting clause, it may be interpreted as either a warranty limitation or a reser-

tection device). The *Bulger* court opined that an ordinary person would construe the clause as a retention of the minerals by the grantor. 138 N.W.2d at 22. Furthermore, the court stated, "[T]o hold that the questioned language [of the 'subject to' clause], without more appearing, was solely a limitation on the liability of the grantor under the warranties in the deed, would actually be a strained and unnatural construction." *Id.* The court also noted that "[t]he expression 'subject to' is a term of qualification which acquires its meaning from the context in which it appears," and that "the words 'subject to' are often used by non-lawyers to cover exceptions, reservations, and exclusions." *Id.* Lastly, the court stated that the expression has no well-defined meaning and that the intent of the parties is to be derived from the whole instrument. *Id.*

In *Kelly v. Haas*, 262 S.W.2d 687 (Ky. 1953), the interpretation of a "subject to" clause which reserved a mineral interest was also fully discussed. In that case the conveyance was made "subject to former conveyance of all mineral rights." 262 S.W.2d at 688. However, only coal rights had been previously conveyed. *Id.* The question addressed was whether the quoted language constituted an exception of *all* the mineral rights, or only of such rights as had been previously conveyed to others. *Id.* Rejecting the argument that the "subject to" language was merely warranty protection language and not exception or reservation language, the court stated that "subject to" can be the equivalent of "reserving." *Id.* Furthermore, after reviewing numerous cases involving the construction or application of the words "subject to," the court noted that none of those cases were authority for the proposition that a "subject to" clause cannot ever create an exception or reservation in favor of a grantor. *Id.* Finally, the court stated that "to say that the phrase 'subject to . . . all mineral rights' was not effective to except or reserve all mineral rights would be to attach an unwarranted importance to the technicalities of the language of conveyancing." *Id.* at 689; *see also* 2 WILLIAMS & MEYERS, *supra* note 3, § 340, at 224.7 (where "subject to" clause refers to mineral interest, not lease, such clause may be construed as exception or reservation from grant); Smith, *supra* note 3, § 15.01 at 15-2 ("subject to" clause normally used to protect grantor's warranty but has been interpreted to retain interest in grantor); *cf.* *State Savs. & Loan Ass'n v. Kauaian Dev.*, 62 Hawaii 188, 613 P.2d 1315, 1231-32 (1980) (after interpreting several cases involving "subject to" clauses which "reserved" mineral interests, court held that "subject to" clause reserved from mortgage the interests stated therein).

⁶ Smith, *supra* note 3, § 15.05 at 15-27; *see also id.* § 15.05 at 15-13 (drafting techniques to avoid problems with "subject to" clauses).

⁷ Smith, *supra* note 3, § 15.05 at 15-27. In general, little controversy has arisen from deeds in which the "subject to" clause has been used within the warranty clause expressly to exclude the named interest from the warranty. *Id.*; *see also infra* note 18 and accompanying text; *cf.* *Brungardt v. Smith*, 178 Kan. 629, 290 P.2d 1039, 1044-45 (1955) ("exception" in warranty provision acted as limitation on warranty only and not as a reservation upon the conveyance).

vation from the grant.⁸ In any event, the meaning attributed to a "subject to" clause, regardless of its location in the deed, is ascertained by the particular jurisdiction's use of construction rules when determining the intent of the parties.⁹ Mississippi law contains its own particularities concerning the interpretation of "subject to" clauses. The ensuing analysis focuses on the present status of Mississippi law in this area.

II. UNDER WHAT CIRCUMSTANCES WILL A CONVEYANCE MADE "SUBJECT TO" A MINERAL INTEREST EFFECT A RESERVATION OF THAT MINERAL INTEREST?¹⁰

A. *The "subject to" clause as a means of creating a valid reservation or exception of a mineral interest*

Since any "subject to" clause which allegedly reserves or excepts the mineral interest described therein must, in any event, substantially comply with the basic rules governing the creation of valid reservations or exceptions, it is necessary to earmark the traditional requirements effectuating a valid reservation or exception. Initially, however, it

⁸ Smith, *supra* note 3, § 15.05 at 15-27. There is a great deal of litigation involving "subject to" clauses which are located in the granting clause. *Id.* The reason for this is that it is hard to determine what function the clause serves in that location—i.e., is it a limitation on the warranty, a definition of the grant, or a reservation? *Id.*

⁹ See, e.g., *Union Oil Co. v. Colglazier*, 360 So. 2d 965, 967 (Ala. 1978)(objective is to find intent of grantor, and, if such can be found from entire instrument, arbitrary rules of construction need not be used); *Kelly v. Haas*, 262 S.W.2d 687, 688 (Ky. 1953)(emphasizing use of "four corners" rule when ascertaining intended effect of "subject to" clause); *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18, 21-22 (1965)(reservation [via "subject to" clause] need not be expressed in granting clause; it may be in warranty, habendum, or reddendum or within four corners of deed; intent of parties to be determined from whole instrument); see also *infra* note 18 and accompanying text.

¹⁰ Mineral interests to which a conveyance is made subject may include those interests created by "prior reservations," "prior conveyances," "prior reservations of record," *ad infinitum*. The particular "subject to" clauses and decisions discussed in this paper are as follows: (1) In *Richardson v. Moore*, 198 Miss. 741, 749, 22 So. 2d 494, 495 (1945), the clause stated that the conveyance was "subject, however, to any mineral or oil rights, if any such exist, belonging to any former owner of said land other than this grantor." *Id.* (2) In *Wilson v. Gerard*, 213 Miss. 177, 182, 56 So. 2d 471, 472 (1952), the clause stated that the conveyance was "subject to one-half interest in mineral and oil rights as conveyed to Wm. Henderson." *Id.* (3) In *Pfisterer v. Noble*, 320 So. 2d 383, 383 (Miss. 1975), the clause in issue stated that "[t]he conveyance and warranties herein are made subject to prior reservations and conveyances of all the oil, gas and other minerals in, on and under said lands." *Id.* (4) Finally, in *Miller v. Lowery*, 468 So. 2d 865, 866 (Miss. 1985), the questioned conveyance contained a clause stating that the conveyance was "subject to the reservation of all oil, gas and other minerals in, on and under the above described land by prior grantors." *Id.*

serves well to note that since the common-law distinction between "reservation" and "exception" has for all practical purposes eroded,¹¹ it is no surprise that practitioners and courts treat these terms synonymously and use them interchangeably.¹² As such, when determining whether a provision is a valid reservation or exception, the use of the terminology is not controlling and the technical meaning of the terms will give way to the manifest intent of the parties.¹³

Although there is thus no meaningful distinction between the two terms, the validity of either is determined by ascertaining whether the proper requirements have been satisfied. Though technical words are not required, the intent to effect a reservation or exception must be clearly disclosed by apt words.¹⁴ Furthermore, the reservation or excep-

¹¹ See *Elkins v. Townsend*, 296 F.2d 172, 177, (5th Cir. 1961)(distinction between "exception" and "reservation" is obsolescent, formalistic nicety of common-law conveyancing that may hinder interpretation of instruments); *Cook v. Farley*, 195 Miss. 638, 652, 15 So. 2d 352, 356 (1943)(distinction is of no practical importance since property excepted or reserved is never included in grant); 2 WILLIAMS & MEYERS, *supra* note 3, § 310 at 578.7 (in modern law, distinction is meaningless). For a thorough discussion of the common-law distinctions between exceptions and reservations, see Ewing, *Reservations and Exceptions of Minerals in Mississippi Conveyancing*, 39 Miss. L.J. 39, 48-49 (1967).

¹² See *Cali v. DeMattei*, 121 Ill. App. 3d 623, 460 N.E. 2d 121, 122-23 (1984)(distinction between exception and reservation highly technical and contrary to primary purpose of ascertaining intent); *Wilson v. Gerard*, 213 Miss. 177, 186-87, 56 So. 2d 471, 473-74 (1952)(in determining extent of grant, distinction unimportant since property excepted or reserved never included in grant); *Federal Land Bank v. Cooper*, 190 Miss. 490, 500, 200 So. 729, 730 (1941)(synonymous effect given to either term); see also Schaffert v. Hartman, 203 Neb. 271, 278 N.W.2d 343, 347 (1979)(whether reservation or exception used, it is clear what is accomplished); *King v. First Nat'l Bank*, 192 S.W.2d 260, 262 (Tex. 1946)(words "exception" and "reservation" used interchangeably); *Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911, 915 (Tex. Civ. App. 1934)(no principal distinction—words given same effect); Schribner, *Reservations in Warranty Deeds*, 54 OKLA. B.J. 2005, 2005 (1982)(in modern times, reservation and exception regarded as equivalent) [hereinafter referred to as Schribner].

¹³ See *Cook v. Farley*, 195 Miss. 638, 652, 15 So. 2d 352, 356 (1943)(use of terms not controlling when court determines whether provision is reservation or exception—court looks to intent of parties); Schribner, *supra* note 12, at 2005 (court values intent of parties more than technical meaning of terms); Ewing, *supra* note 11, at 41 (courts are concerned with what parties intended from four corners of deed); 1A C. SUMMERS, OIL AND GAS (perm. ed. 1954) § 137 at 303-04 (1954)(court focuses on intent of parties when construing reservations or exceptions).

¹⁴ *Cook v. Farley*, 195 Miss. 638, 650-51, 15 So. 2d 352, 355 (1943); *Federal Land Bank v. Cooper*, 190 Miss. 490, 500, 200 So. 729, 730 (1941); *Moore v. Lord*, 50 Miss. 229, 234 (1874); Ewing, *supra* note 11, at 42; Ewing, *Mississippi Mineral Reservations and Exceptions Revisited* 1-2 (June 20, 1981)(presented to Mississippi Oil and Gas Lawyers Association).

Ewing's *Mississippi Mineral Reservations and Exceptions Revisited* elaborates on

tion must arise out of the estate granted¹⁵ and it cannot create any interest in favor of a stranger to the title.¹⁶ Finally, the words must describe the interest reserved or excepted with adequate specificity and certainty.¹⁷ If these basic requirements are met, and if the court finds the requisite intent to reserve or except the questioned mineral interest from the conveyance, then a valid reservation has been effected notwithstanding an atypical location of the language or clause within the deed.¹⁸

As for construction matters, it is crucial to note that just as "loca-

Mississippi's policy regarding apt words by stating that "any words are apt which manifest the grantor's intention to reserve or except such as "keeps," "retains," "shall have and own," "does not include," and "subject to." Regardless of the words used, a reasonable construction should be given to such wording according to the intention of the parties, the force of the language used, the ordinary meaning of the words, and the meaning of specific words. *See Cooper*, 190 Miss. at 500, 200 So. at 730.

¹⁵ *Federal Land Bank v. Cooper*, 190 Miss. 490, 500, 200 So. 729, 730 (1941); *Moore v. Lord*, 50 Miss. 229, 234 (1874); *see Ewing*, *supra* note 11, at 42 (Mississippi recognizes rule that reservation or exception must arise out of estate granted).

¹⁶ *Wilson v. Gerard*, 213 Miss. 177, 186-87, 56 So. 2d 471, 473-74 (1952); *Cook v. Farley*, 195 Miss. 638, 649-51, 15 So. 2d 355 (1943); *Ewing*, *supra* note 11, at 42; *see Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975)(citing *Wilson* with approval). *See generally* 1 WILLIAMS & MEYERS, *supra* note 3, at § 310.4 (reservations in favor of stranger is ineffective to give title to stranger).

¹⁷ *Day v. Gibraltar Oil Co.*, 344 So. 2d 474, 478 (Miss. 1977); *Federal Land Bank v. Cooper*, 190 Miss. 490, 500, 200 So. 2d 729, 730-31 (1941); *Moore v. Lord*, 50 Miss. 229, 234 (1874).

¹⁸ The common-law rule is that a reservation or exception not included in the granting clause or *reddendum* clause is void as repugnant to the grant. 2 WILLIAMS & MEYERS, *supra* note 3, § 340 at 578.8. However, modern construction practice requires courts to abandon formalistic rules and interpret the instrument from its "four corners" to arrive at the intention of the parties. *Id.* As such, a substantial number of courts have repudiated the repugnancy rule and will thus give effect to a reservation or exception of minerals without regard to the location of the clause within the deed. *Id.* However, some jurisdictions adhere to the strict repugnancy rule and hold that language located in the warranty or *habendum* clause which allegedly "reserves" the mineral interest will only serve to protect the grantor's warranty. *See, e.g., Mueller v. Strangeland*, 340 N.W.2d 450, 453-54 (N. D. 1982)(where only reference to mineral exception was within warranty clause, deed not to be construed as excepting minerals); *First Nat'l Bank v. Allard*, 182 Colo. 297, 513 P.2d 455, 457-58 (1973)(provision of warranty clause did not except minerals from grant but merely excluded them from warranty); *Jarrett v. Moore*, 159 Okla. 93, 14 P.2d 390, 391 (Okla. 1932)(exceptions in *habendum* clause of warranty deed cannot be held as reservations of any part of title conveyed by granting clause, but must be construed only as excepting such part from covenant of warranty). *But see Barber v. Flynn*, 628 P.2d 1151, 1154 (Okla. 1980)(construing language of exception following *habendum* clause as "reservation" of mineral interest). These considerations are equally applicable when "subject to" clauses are construed as constituting reservations or exceptions. *See supra* note 9 and accompanying text.

tion, location, and location" are the three major aims of real estate salespeople, "intent, intent, and intent" are the three major aims of courts when considering the effect given to reservations or exceptions, whether they be created by traditional apt words or "subject to" clauses. Suffice it to say that the interpretation of a disputed reservation, exception or "subject to" clause may yield different results depending on whether resort is had to construction rules and extrinsic evidence or instead to the "four corners" of the deed alone and the language therein. It is widely known that the usual policy relating to construction and operation of deeds, and to reservations and exceptions therein, controls in determining the rights and liabilities of the parties under a particular grant or reservation of minerals.¹⁹ The deed construction policy which Mississippi courts specifically adhere to may be summarized as follows: in construing a written instrument, the task of the court is to ascertain the intent of the parties from the four corners of the instrument.²⁰ The court must consider the ordinary meaning of the language and the actual meaning of specific words.²¹ Each word in the questioned deed or clause should then be given a meaning if such can possibly be done.²² Even if the deed or clause is inarticulately drawn, the court is still bound by the "four corners."²³ As such, where effect can be given to all provisions of the disputed deed or

¹⁹ *Oldham v. Fortner*, 221 Miss. 732, 742, 74 So. 2d 824, 828 (1954); *see West v. Arrington*, 183 So. 2d 824, 826-27 (Miss. 1966)(using normal deed construction concepts when determining if instrument reserved minerals from conveyance); *Rogers v. Morgan*, 250 Miss. 9, 21, 164 So. 2d 480, 484 (1964)(applying usual deed construction principles where mineral conveyance was in issue); *Texas Gulf Producing Co. v. Griffith*, 218 Miss. 109, 144, 65 So. 2d 834, 836 (1953)(using usual deed and contract construction principles when determining whether reservation of minerals was intended).

²⁰ *Day v. Gibraltar Oil Corp.*, 344 So. 2d 474, 478 (Miss. 1977)(Smith, J., dissenting); *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975); *Welborn v. Henry*, 252 So. 2d 779, 780 (Miss. 1971); *Rogers v. Morgan*, 250 Miss. 9, 21, 164 So. 2d 480, 484 (1964); *Ford v. Jones*, 226 Miss. 716, 720, 85 So. 2d 215, 217 (1956). *See generally* Ewing, *supra* note 11, at 48-49 (main object in Mississippi deed construction policy is to ascertain intention from language used; duty of court is to construe as written).

²¹ *Owen v. Gerity*, 422 So. 2d 284, 288 (Miss. 1982); *Cole v. McDonald*, 236 Miss. 168, 182, 109 So. 2d 628, 634 (1959); *Armstrong v. Bell*, 194 Miss. 29, 36, 24 So. 2d 10, 12 (1945); *see Witherspoon v. Campbell*, 219 Miss. 640, 646, 69 So. 2d 384, 386 (1955)(words in grant or reservation must be given meaning they usually import in business to which they relate).

²² *Harris v. Griffith*, 210 So. 2d 629, 633 (Miss. 1968); *Rogers v. Morgan*, 250 Miss. 9, 21, 164 So. 2d 480, 484 (1964); *Salem Brick & Tile Co. v. Williams*, 210 Miss. 560, 567, 50 So. 2d 130, 132 (1951); *Richardson v. Moore*, 198 Miss. 741, 750, 22 So. 2d 494, 495 (1945); *Gulf S.I.R. Co. v. Patton*, 180 Miss. 756, 762, 178 So. 468, 469 (1938).

²³ *Allen v. Boyken*, 199 Miss. 417, 425, 24 So. 2d 748, 749 (1946); *see* Ewing, *supra* note 11, at 49 (court restricted to four corners despite inartful language).

clause and the intention of the parties is clear, rules of ambiguous deed construction cannot be invoked.²⁴ In these cases, all negotiations between the grantor and grantee with respect to the scope of the disputed deed or clause are merged in the deed and it is error to allow extrinsic evidence or oral testimony to shed light on the parties' intentions.²⁵ However, if no reasonable meaning can be attributed to the disputed deed or clause as is, the provision is ambiguous and only then may the court resort to extrinsic evidence and construction rules to ascertain the intention of the parties.²⁶

These principles denote Mississippi's policy concerning the interpretation of ambiguous and unambiguous deeds or provisions contained therein. Concerning the construction of "subject to" clauses, Mississippi has consistently acknowledged the effectiveness of these clauses to create valid reservations or exceptions of mineral interests. In *Wilson v. Gerard*,²⁷ the Mississippi Supreme Court confronted "exception" language which stated that the conveyance was made "subject

²⁴ *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 463 (S.D. Miss. 1964); *Rogers v. Morgan*, 250 Miss. 9, 21, 164 So. 2d 480, 484 (1964); *Berry v. Luckett*, 248 Miss. 99, 107, 158 So. 2d 706, 710 (1963); *Dale v. Case*, 217 Miss. 298, 308-09, 64 So. 2d 344, 348 (1953); *Martin v. Adams*, 216 Miss. 270, 276, 62 So. 2d 328, 329 (1953); see *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 622 (5th Cir. 1985)(when instrument is clear, Mississippi courts look solely to language in instrument for construction); *Jones v. Benefit Trust Life Ins. Co.*, 605 F. Supp. 179, 181 (S.D. Miss. 1985)(court is limited to "four corners" where contract not ambiguous; parol evidence not allowed); *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975)(where deed was not ambiguous, decision not controlled by cases dealing with ambiguities).

²⁵ *Lucas v. Thompson*, 240 Miss. 767, 773, 128 So. 2d 874, 876-77 (1961); see *West v. Arrington*, 183 So. 2d 824, 827 (1966)(allegation that parties agreed to include minerals in conveyance was of no consequence since all negotiations were merged in deed); *Ewing*, *supra* note 11, at 49-50 (error to allow extrinsic evidence to shed light on parties' intentions unless deed or clause is ambiguous).

²⁶ *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 622 (5th Cir. 1985); *Barnett v. Getty Oil Co.*, 266 So. 2d 581, 586 (Miss. 1972); see *Richardson v. Moore*, 198 Miss. 741, 750, 22 So. 2d 494, 495 (1945)(where reservation clause was ambiguous, court looked outside four corners for practical construction placed on clause by parties). The *Richardson* court used the rules of construction which typically apply where a court, by finding a provision ambiguous, ventures from the "four corners." The rules applied were that (1) the deed must be read in light of the circumstances surrounding the parties at the time of its execution; (2) the main document and any to which it refers must be construed together; (3) the practical construction placed on the deed by the parties will have considerable weight in determining the meaning; (4) if the deed is subject to two possible constructions, one more favorable to the grantor and one more favorable to the grantee, that construction more favorable to the grantee will be adopted. *Id.* at 750, 22 So. 2d at 495. These same rules were applied in *Day v. Gibraltar Oil Corp.*, 344 So. 2d 474, 475 (Miss. 1977).

²⁷ 213 Miss. 177, 56 So. 2d 471 (1952).

to one-half interest in mineral and oil rights as conveyed to Wm. Henderson."²⁸ In determining whether this clause prevented the one-half interest from passing to the grantee, the court stated that "a grantor who makes a reservation or exception to his grant does not part with his full title or dominion."²⁹ Furthermore, the court noted that "property which is excepted is not granted; it does not pass to the grantee"³⁰ Applying these rules to the "subject to" clause in issue, the *Wilson* court acknowledged the effectiveness of this "subject to" clause in excepting the interest described therein.³¹

This acceptance of the "subject to" clause as a means of creating a valid exception was noted in *Oldham v. Fortner*.³² In *Oldham*, the deed in question did not contain a "subject to" clause. The court stated, however, that "a valid exception may be made of such portion of the grantor's land as has been previously sold or conveyed, as where the deed is made *subject to* the conditions and provisions of a prior conveyance"³³

Perhaps the clearest example of Mississippi's acceptance of the "subject to" clause as a means of reserving or excepting a mineral interest is found in *Pfisterer v. Noble*.³⁴ In that case the "subject to" clause stated that "[t]his conveyance and warranty herein are made subject to prior reservations and conveyances of all of the oil, gas and other minerals in, on and under said lands." The losing party contended that since the grantor had previously sold all the oil, gas and minerals, but had later repurchased one-eighth of them, then the conveyance was not "subject to" the one-eighth interest that the grantor had reacquired.³⁵ Rejecting that argument, the court held that the "subject to" clause clearly evidenced an intent to except *all* the oil, gas, and other minerals from the conveyance rather than only such rights (seven-eighths) as were vested in parties other than the grantor.³⁶ In so holding, the court applied the "four corners" rule of construction and stated that since the "subject to" clause made clear that *both* the conveyance and the warranty were subject to prior reservations and con-

²⁸ *Id.* at 177, 56 So. 2d 471.

²⁹ *Id.* at 186, 56 So. 2d at 473.

³⁰ *Id.*, 56 So. 2d at 473.

³¹ *Id.*, 56 So. 2d at 473. The court held that because of the existence of the "subject to" clause, the grantee acquired no title to the interest described in the deed. *Id.*

³² 221 Miss. 732, 74 So. 2d 824 (1954).

³³ *Id.* at 741, 74 So. 2d at 827-28 (emphasis added).

³⁴ 320 So. 2d 383 (Miss. 1975).

³⁵ *Id.* at 383-84.

³⁶ *Id.* at 384.

veyances of *all* oil, gas, and minerals, then the "subject to" language could not logically be interpreted as a mere limitation of the grantor's warranty, as might be the case had the clause simply stated that the *warranty* was subject to prior reservations.³⁷

The aforementioned principles and holdings illustrate that Mississippi is not hesitant to discern from the four corners of a deed that a "subject to" clause may clearly effect a valid reservation or exception of the mineral interest described therein. However, the following questions remain: What is the effect of a reservation or exception which is invalid? What occurs when a "subject to" clause arguably reserves or excepts an interest which the clause erroneously describes as having been previously conveyed or reserved? Will the mineral interest described in the clause pass to the grantee?

B. Invalid or erroneous reservation or exception language which may prevent the described interest from passing to the grantee

- (1) Where the reservation or exception erroneously attempts to reserve the mineral interest in favor of a stranger to the deed

In *Cook v. Farley*,³⁸ the Mississippi Supreme Court confronted an exception clause which stated that "[t]here is also excepted from this conveyance all oil, gas and mineral deposits on said lands, which the grantors hereto have promised to convey to Aquilla B. Cook."³⁹ After noting that such language raised several theories concerning the con-

³⁷ *Id.*; see *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 463 (S.D. Miss. 1964)(construing deed as written without invoking construction rules, court stated that "the words 'subject to' mean 'subservient to' or 'limited by' . . . 'Subject to' as used in the deed referring to an earlier conveyance or lease means that title passed in the subsequent instrument was 'subject to' the earlier lease . . . These words are words of qualification showing the grantor's intent not to grant absolute title"); *Bounds v. Ohio Oil Co.*, 234 Miss. 277, 285-86, 106 So. 2d 66, 69-70 (where deed was executed subject to lease, "subject to" clause showed intent that interest described therein should not pass to grantee); see also *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18, 22 (1965)(from four corners of deed, ordinary person would construe "subject to" clause as showing grantor's intent to retain mineral interest described therein); *Kelly v. Haas*, 262 S.W.2d 687, 688-89 (Ky. 1953)(applying four corners rule, court stated that "to say the phrase 'subject to . . . all mineral rights' was not effective to except or reserve all mineral right would be to attach unwarranted importance to the technicalities of the language of conveyancing"); cf. *State Savs. & Loan Ass'n v. Kauaian Dev.*, 62 Hawaii 188, 613 P.2d 1315, 1322 (1980)("subject to" may serve as limitation to interests made subject to mortgage which, while not creating any affirmative rights in strangers to mortgage, reserves or excepts leasehold from mortgage).

³⁸ 195 Miss. 638, 15 So. 2d 352 (1943).

³⁹ *Id.* at 648, 15 So. 2d at 354.

veyance of the described mineral interest,⁴⁰ the court stated that, in any event, the exception was ineffective to convey any interest to the third party, Aquilla Cook.⁴¹ However, when considering whether the invalid exception contained in the deed was wholly inoperative, the court stated that such invalid reservations or exceptions nevertheless operate as exceptions to the grant when so intended.⁴² Therefore, no title to the minerals passed to the grantee in view of the exception in the deed, even though the exception was unenforceable in favor of the third party.⁴³ Obviously, the underlying requirement for the application of this principle is that the deed must at least evidence an intent that the property not pass to the grantee.⁴⁴

⁴⁰ *Id.* at 648-49, 15 So. 2d at 354-55. The court stated that to uphold the decree confirming the alleged title of the grantee to the minerals in controversy, it would be necessary to adopt at least one of the following legal theories: (1) that the language of the exception was sufficient to grant and convey the minerals to the stranger to the deed, Aquilla Cook; (2) that the exception was wholly inoperative and of no effect, so that the deed conveyed a fee simple title to the grantee as though it had contained no exception of the minerals; or (3) that the terms of the deed had the effect of creating an obligation on the grantor's part to convey the minerals to Aquilla Cook, the stranger to the deed. *Id.* at 648-49, 15 So. 2d at 354. The court viewed each of the foregoing theories as wholly untenable. *Id.* at 649, 15 So. 2d at 355.

⁴¹ *Id.*, 15 So. 2d at 355. The exception was wholly incapable of excepting the minerals in favor of Aquilla Cook since there were no words in the deed which imported a grant of the minerals to Cook. Furthermore, with regard to reservations erroneously executed in favor of third parties, the court stated, "Property cannot be conveyed by a reservation . . . as such [a reservation] is effective only in favor of the grantor and is ineffectual to create title in a third party." *Id.* at 651, 15 So. 2d at 355.

⁴² *Id.*, 15 So. 2d at 355-56. Citing *Hall v. Hall*, 66 Miss. 35, 550, 523 (1888), the court stated that while no estate passes to such third parties mentioned in the deed, the invalid exception is nevertheless effective to retain the title in favor of the grantor to the property embraced in the exception. *Cook*, 195 Miss. at 651, 15 So. 2d at 355. While noting that there is no distinction between "reservations" and "exceptions" for purposes of this rule's applicability, the court stated further that "[a]n exception purporting to be in favor of a stranger cannot operate as a conveyance to him of the excepted grant, although such an exception is effectual to prevent the title to the excepted land from passing to the grantee." *Id.*, 15 So. 2d at 356; *see also Joiner v. Sullivan*, 260 S.W.2d 439, 440 (Tex. Civ. App. 1953)(mineral reservation to children wholly inoperative but rights to minerals retained by grantor); *Sword v. Sword*, 252 S.W.2d 869, 870 (Ky. 1952)(exception in favor of stranger may operate in favor of grantor to exclude that part from conveyance); *Stetson v. Nelson*, 118 N.W.2d 685, 688 (N.D. 1962)(reservation or exception purporting to be in favor of stranger, although invalid, operates in favor of grantor—prevents title to excepted or reserved property from passing to grantee).

⁴³ *Cook*, 195 Miss. at 653, 15 So. 2d at 356.

⁴⁴ *See id.* at 652-53, 15 So. 2d at 355-56 (although reservation is ineffectual to create title in stranger, it may when so intended operate as exception to grant); *Stetson v. Nelson*, 118 N.W.2d 685, 688 (N.D. 1962)(although reservation was void, grantor's attempt to reserve interest for stranger showed intent not to pass interest to grantee).

Such is the effect given to traditional reservations or exceptions which are invalidated by an erroneous attempt to reserve or except an interest in favor of a third party. However, Mississippi apparently has not addressed the question of whether a deed containing a "subject to" clause, which purportedly effects such a reservation or exception in favor of a stranger, will likewise withhold the interest described therein from the conveyance. It seems likely, however, that if a court is confronted with a conveyance made "subject to" an interest reserved in favor of a third party or "promised" to a third party, and if the court finds the requisite intent that the interest not pass to the grantee, then the interest referred to in the clause will be excepted from the conveyance and will remain with the grantor.

(2) Where the reservation or exception language refers to the mineral interest as having been previously reserved, excepted, sold, or as otherwise outstanding, but in fact that conveyance or reservation to which the language refers is invalid or nonexistent

Another ground for controversy over the interest referred to by a reservation, exception, or "subject to" clause is that situation where the language in the deed incorrectly refers to the ownership status of the mineral interest described therein.⁴⁵ Consider the following clauses: "excepting the one-fourth minerals previously conveyed by that deed"; "reserving the mineral rights in accordance with a deed made to us by John Doe"; "conveyance subject to the one-half minerals as previously conveyed to John Doe"; "conveyance subject to prior reservations and conveyances of all the oil, gas, and other minerals." The dispute involves the conflicting treatment given to such language when the recitals in the clauses are false or erroneous and the grantor owned part or all of the described interest when the incorrect recital was made and the deed executed.⁴⁶ Some jurisdictions hold that the recital merely evidences an intent to protect the grantor's warranty as to the interest referred to and thus is not intended to withhold the minerals from the grantee if the grantor should then own them.⁴⁷ Conversely, some juris-

⁴⁵ 2 WILLIAMS & MEYERS, *supra* note 3, § 310.1 at 580.10.

⁴⁶ *Id.* The typical dispute involves a title contest between grantor and grantee or grantee and the supposed owner of the minerals by the prior sale or reservation of the minerals. *Id.*

⁴⁷ See *Murray v. U.S.*, 291 F.2d 161, 162 (8th Cir. 1961)(language of instrument itself did not reserve interest to grantor); *United States v. McKenzie County, N.D.*, 187 F. Supp. 470, 475-76 (D.N.D. 1960), *aff'd sub. nom. Murray v. U.S.*, 291 F.2d 161 (8th Cir. 1961)(reservation which referred to acreage incorrectly assumed to be owned by county

dictions hold that the incorrect recitals in these "descriptive" reservation or exception clauses do not evidence a mere protection on the warranty as to that interest; instead, these erroneous clauses work to retain the described mineral interests for the grantor, if he owned them, and withhold the interest from the grantee in any event.⁴⁸ The discussion below first encompasses Mississippi's treatment of mineral interests to which traditional exception or reservation language incorrectly refers as having been previously sold, reserved, or as otherwise outstanding. Following this there is a discussion of Mississippi's treatment of "subject to" clauses which incorrectly refer to the interest described as having been previously sold or reserved, but where in fact the interest, in whole or in part, remained with the grantor at the time of the disputed conveyance.

In *Richardson v. Moore*,⁴⁹ the court confronted the question of whether a reservation clause, in a deed executed by Hoskins Lumber Company to Mrs. Smith, conveyed or excepted the minerals. The clause reserved "the oil and mineral rights on the said lands together with the right to enter upon, explore for and remove the said oil and mineral in accordance with a deed made to us by the Edward Hines

was only restriction on warranty and not reservation from conveyance); *Ladd v. DuBose*, 344 S.W.2d 476, 478-79 (Tex. Civ. App. 1961)(grantors recital to term interest held by third party became erroneous when term expired; grantors failed to expressly reserve interest); 2 WILLIAMS & MEYERS, *supra* note 3, § 310.1 at 580.11 (erroneous recitals in reservation or exception clause often evidence intent to protect warranty, not to withhold minerals from grantee).

⁴⁸ See *Sholz v. Heath*, 642 S.W.2d 554, 557 (Tex. Civ. App. 1982)(reservation valid when explicitly made despite erroneous recital to interest which had reverted to grantor); *Union Oil Co. v. Colglazier*, 360 So. 2d 965, 968 (Ala. 1978)(reservation with erroneous recital excepted interest from conveyance where it did not incorporate by reference any prior deeds or reservations); *Canter v. Lindsey*, 575 S.W.2d 331, 335 (Tex. Civ. App. 1978)(reservation of $\frac{1}{4}$ mineral interest erroneously thought to be owned by third party acted to except that interest from conveyance); *Noffsinger v. Brown*, 408 S.W.2d 436, 437-38 (Ky. 1966)(where reservation clause erroneously stated that minerals were conveyed by former deed, such language was not protection of warranty as to those minerals; rather, it was descriptive of interest intended not to be conveyed); *Brown v. Brown*, 404 S.W.2d 286, 287 (Ky. 1966)(where provision in granting clause stated that minerals were previously sold but only coal rights had actually been sold, provision operated as reservation of all minerals, not just coal rights); *Pich v. Lankford*, 157 Tex. 335, 302 S.W.2d 645, 648 (1957)(giving of false reason for exception from grant does not operate to alter estate excepted, nor does it operate to pass excepted interest to grantee; such erroneous exception language does not operate merely for protection of grantor's warranty); *Gibson v. Sellars*, 252 S.W.2d 911, 914 (Ky. 1952)(erroneous recitation in exception clause that minerals had been theretofore sold was only false recitation of fact; it did not limit effect of exception).

⁴⁹ 198 Miss. 741, 22 So. 2d 494 (1945).

Yellow Pine Trustees, conveying to us the said land.”⁵⁰ Since the intent of the reservation clause was to be ascertained in accordance with the Edward Hines deed,⁵¹ the court found the clause ambiguous and thus turned to the circumstances surrounding the execution of the deed from Edward Hines to Hoskins Lumber Company and the deed from Hoskins Lumber Company to Mrs. Smith.⁵² In so doing, the court found it clear that Hoskins Lumber Company, when preparing their deed to Mrs. Smith, knew that Edward Hines was going to convey the land to them, but were uncertain what provision, if any, the deed would contain with reference to the minerals.⁵³ Therefore, the court held that when Hoskins Lumber Company reserved the minerals “in accordance with a deed made to us by Edward Hines,” the obvious intent of this clause was to protect Hoskins’ warranty to Mrs. Smith from whatever reservation or exception of minerals the Hines’ deed might contain.⁵⁴ Consequently, the reservation clause, under these circumstances, did not retain in the grantor, Hoskins Lumber Company, any interest in the minerals.⁵⁵

⁵⁰ *Id.* at 749, 82 So. 2d at 495. The appellees claimed that this clause in the Hoskins deed to Mrs. Smith excepted the minerals from that conveyance. *Id.*

⁵¹ *Id.* at 750-51, 22 So. 2d at 496. In light of the fact that the reservation clause in Mrs. Smith’s deed contained the provision “in accordance with a deed made to us by . . . Edward Hines,” the court stated that “[i]f we hold the minerals were excepted without qualification, we entirely disregard the reference to the Hines deed.” *Id.* In order to resolve this ambiguity the court invoked the following construction rules: (1) the deed must be read in light of the circumstances surrounding the parties when it was executed; (2) the main document and that to which it refers must be construed together; (3) if the wording of the deed is ambiguous, the practical construction placed thereon by the parties will have much weight in determining the meaning; (4) if the deed is ambiguous and subject to two possible constructions, that construction more favorable to the grantee will be adopted. *Id.* at 750, 22 So. 2d at 495.

⁵² *Id.* at 750-51, 22 So. 2d at 495-96. The fee simple conveyance via warranty deed from Edward Hines to Hoskins Lumber Company unquestionably vested fee simple title in Hoskins Lumber Company *Id.* The deed from Edward Hines to Hoskins Lumber Company was dated August 31, 1922, while the deed from Hoskins Lumber Company to Mrs. Smith was dated August 19, 1922, twelve days earlier. *Id.*

⁵³ *Id.* at 750-51, 22 So. 2d at 495-96. When considering the fact that the deed from Hoskins Lumber Company to Mrs. Smith was executed twelve days prior to the deed from Edward Hines to Hoskins Lumber Company, the court determined that when Hoskins Lumber Company prepared its deed to Mrs. Smith, it apparently did not know whether any mineral exceptions would be in its deed from Hines. *Id.*

⁵⁴ *Id.* at 751, 22 So. 2d at 496.

⁵⁵ *Id.* 22 So. 2d at 496. Emphasizing the ambiguity involved in the reservation clause, the court concluded that the reservation clause must be construed more strongly against the grantor, Hoskins Lumber Company. *Id.* at 752, 22 So. 2d at 496.

In a similar case, *Oldham v. Fortner*,⁵⁶ the court confronted an exception which clearly but erroneously referred to the minerals as having been previously sold or conveyed. The clause purported to except "all mineral rights heretofore sold and conveyed."⁵⁷ The trial court agreed with the complainants that since the prior sale of the minerals was void, then the exception clause in issue was void and the minerals were vested in the complainants who claimed under the grantee of the deed in issue.⁵⁸ Rejecting this decision, however, the Mississippi Supreme Court found that the validity of the exception in issue was not dependent in any way upon the validity of the prior conveyance of the minerals to which the exception referred.⁵⁹ The court stated that "when certain tracts excepted are specifically described, and it is further recited that they have been previously sold or conveyed, the exception will be good although the recital is false . . . or although the prior conveyance did not effectuate a transfer of the property described therein."⁶⁰ Applying this rule, the court held that the exception in issue prevented the minerals from passing to the grantee even though it falsely referred to the described minerals as having been previously sold or conveyed.⁶¹

⁵⁶ 221 Miss. 732, 74 So. 2d 824 (1954).

⁵⁷ *Id.* at 737, 74 So. 2d at 825.

⁵⁸ *Id.* at 739, 74 So. 2d at 827. The prior conveyance was executed by a mineral deed in which the grantor sold and conveyed to the grantee "an undivided ____ (____) [sic] interest in and to all of the oil, gas and other minerals of every kind and character." *Id.* at 736, 74 So. 2d at 825. The chancellor held that this deed was void "for want of any description as to what was being conveyed." *Id.* at 739, 74 So. 2d at 827. The chancellor further held that since this mineral deed was void, then all of the other reservations contained in successive deeds were void for want of description of the minerals reserved, and that the complainants thus were owners of a fee simple title to the lands which included the minerals. *Id.*

⁵⁹ 221 Miss. at 740, 74 So. 2d at 827. The court noted that even though the clause attempted to except minerals which in fact had not been sold because of the faulty deed, "[i]t is always competent for the vendor to convey the fee in land to the vendee and to except therefrom some part of the land conveyed." *Id.* Furthermore, the court stated that "[t]he office of an exception is to exclude from the operation of the grant some existing portion of the estate or parcel granted which would otherwise pass under the general description of the deed," and that "a valid exception may be made of such portion of the grantor's land as has been previously sold or conveyed, as where a deed is made subject to the conditions and provisions of a prior conveyance, or where it purports to convey the grantor's 'remaining interest.'" *Id.* at 740-41, 74 So. 2d at 827-28.

⁶⁰ 221 Miss. at 741, 74 So. 2d at 828.

⁶¹ *Id.* at 743-44, 74 So. 2d at 829. The court restated the applicable rule as follows: "An exception of a specific part of the subject matter of the grant is effectual to exclude it from the grant notwithstanding an untrue circumstance . . . recited in relation to the excepted part." *Id.* at 741, 74 So. 2d at 828.

In a similar case, *West v. Arrington*,⁶² the court addressed the question of whether an erroneous reservation clause was intended to protect the grantor's warranty or to reserve the minerals referred to therein. The clause stated that "all oil, gas and minerals . . . [are] hereby reserved and excepted from this conveyance, said oil, gas and minerals . . . having heretofore been reserved and excepted, and are not owned by grantor."⁶³ The claimants argued that since the grantor did in fact own an interest in the minerals, then the reservation clause was false and, as such, was merely intended to protect the grantor's warranty and not to reserve the minerals.⁶⁴ However, the court reasoned that since the reservation clause made it clear that no minerals were being conveyed, and since the grantee would not have received the minerals if the statements in the reservation clause had been true, then the erroneous statement that the minerals had been theretofore reserved and excepted, and were not owned by the grantor, should not be construed as a mere limitation on the warranty, but rather as a reason for the exception.⁶⁵ Thus, the reservation clause was effective to reserve the minerals described therein.⁶⁶

These cases typify the treatment Mississippi has given to *traditional* reservation or exception clauses which ambiguously or incorrectly refer to the ownership status of the mineral interest described therein. As *Richardson* points out, where a reservation or exception is made "in accordance with" and with specific reference to a prior deed, the reservation or exception language is treated as ambiguous and resort must be had to the prior deed, the circumstances surrounding the parties, and construction rules to give the clause its intended effect. However, as *Oldham* and *West* point out, if the traditional reservation or exception clause unambiguously but erroneously refers to the mineral interest described therein as having been previously conveyed, reserved, or excepted, but in fact the grantor owned such interest at the time of the conveyance, then the faulty reservation or exception lan-

⁶² 183 So. 2d 824 (Miss. 1966).

⁶³ *Id.* at 825.

⁶⁴ *Id.* at 826. Arguing that the reservation clause was an untrue statement since, at the time of the conveyance, the grantor owned part of the minerals, the claimants maintained that the clause merely amounted to a disclaimer of ownership. *Id.* Furthermore, the claimants relied on *Richardson v. Moore*, 198 Miss. 741, 22 So. 2d 494 (1945), for the invocation of the construction rules used in that case (*see supra* note 51), which interpreted a reservation clause made ambiguous by its specific reference to a prior deed. *West*, 183 So. 2d at 826. However, finding no ambiguity, the court did not apply those rules in the instant case. *Id.*

⁶⁵ 183 So. 2d at 826.

⁶⁶ *Id.*

guage nevertheless operates to withhold the interest from the conveyance. Such clauses evidently will not be construed as a mere limitation on the grantor's warranty. The reasoning appears twofold: first, where such explicit reservation or exception language is employed, the clause obviously shows an intent that the described interest not pass to the grantee; second, the grantee would not have received the described interest in any event if the erroneous facts in the reservation or exception language had been true.

With these principles considered, the question now posed is whether the treatment given these traditional exception and reservation clauses with erroneous recitals will also be given to "subject to" clauses which erroneously refer to the interest described therein as having been previously conveyed, reserved, or excepted.

In *Wilson v. Gerard*,⁶⁷ the court addressed the question of whether an erroneous "subject to" clause in a deed from Gerard to Wilson prevented the mineral interest described therein from passing to the grantee. The clause stated that the interest was "subject to one-half interest in mineral and oil rights as conveyed to Wm. Henderson."⁶⁸ The recital was erroneous because William Henderson did not exist.⁶⁹ The complainant, Wilson, argued that since the exception attempted by the "subject to" clause was null and void for want of a prior grantee *in esse*, then title to the minerals referred to in the clause became vested in Wilson by virtue of the deed from Gerard to him.⁷⁰ The court noted that, by virtue of the void deed to Henderson, the minerals were

⁶⁷ 213 Miss. 177, 56 So. 2d 471 (1952).

⁶⁸ *Id.* at 182, 56 So. 2d at 471. The court noted that this was a conveyance of lands by warranty deed and that the "subject to" clause immediately followed the description of the land. *Id.*, 56 So.2d at 471. The deed was executed by Gerard on May 7, 1938, to Wilson, the complainant. *Id.*, 56 So. 2d at 471.

⁶⁹ *Id.*, 56 So. 2d at 471. The complainant, Wilson, grantee under the disputed May 8, 1938, deed, alleged that William Henderson was a nonexistent and fictitious person to whom a purported deed of conveyance was claimed to have been executed by Wilson's grantor, Gerard, on April 1, 1939. *Id.* The complainant further alleged that the deed from Gerard to "Wm. Henderson" was executed for the purpose of defrauding and cheating the complainant out of an undivided one-half interest in the oil, gas and other minerals in, on, and under the land. *Id.* at 186, 56 So. 2d at 473. In any event, the facts showed that had complainant Wilson checked the land records he would not have seen the deed from Gerard to William Henderson since that deed was not recorded until March 21, 1945, six years after the deed from Gerard to Wilson was recorded. *Id.*

⁷⁰ *Id.* at 183, 56 So. 2d at 472. Wilson relied on *Morgan v. Collins School House*, 160 Miss. 321, 133 So. 675 (1931), and *Morgan v. Collins School House*, 157 Miss. 295, 127 So. 565 (1930), which expressly held that a deed having no grantee *in esse* is void. *Wilson*, 213 Miss. at 183, 56 So. 2d at 472.

still owned by Gerard at the time of the conveyance to Wilson.⁷¹ The court therefore phrased the sole issue as whether the one-half undivided interest in the minerals, which Gerard purported to convey when he named Henderson as grantee, became vested in Wilson or were retained by Gerard.⁷² In concluding that the minerals did not pass to Wilson, the court implicitly equated the "subject to" provision with traditional reservation and exception language and stated that "an exception will be good as to property recited to have been previously sold or conveyed, although the recital is false."⁷³ Accordingly, the court affirmed the trial court's determination that the "subject to" clause in issue operated to prevent the mineral interest described therein from passing to the grantee, Wilson.⁷⁴

At this juncture it should be noted that *Wilson* was apparently the first Mississippi case that strongly endorsed the use of "subject to" language as a tool for excepting certain mineral interests described within a deed. Furthermore, the paramount question in *Wilson* was whether the one-half minerals, erroneously referred to by the "subject to" clause as having been previously conveyed to a fictitious grantee, should remain with the grantor.⁷⁵ The disposition of this question, however, did not involve elaboration as to whether the "subject to" clause should be treated as a warranty limitation as to the one-half minerals erroneously referred to as having been previously conveyed. Nor did *Wilson's* analysis explicitly conclude that the term "subject to," as interpreted from the four corners, automatically evinces an intent that the interest referred to should not pass to the grantee. In-

⁷¹ *Wilson*, 213 Miss. at 183, 56 So. 2d at 472. Following the rule that a deed having no grantee *in esse* is void, the court reasoned that since the deed from Gerard to Henderson was void, it followed that Gerard was not thereby divested of any part of the minerals under the lands thereafter sold to Wilson. *Id.*

⁷² *Id.* at 183-84, 56 So. 2d at 472. The court quashed the fraud allegation by reasoning that if the representation had been true that one-half of the minerals had been sold to William Henderson, then Wilson would have received only one-half of the minerals. *Id.* at 186, 56 So. 2d at 473.

⁷³ *Id.* at 187, 56 So. 2d at 473. The court also stated that "a grantor who makes a reservation or exception to his grant does not part with full title or dominion. Property which is excepted is not granted; it does not pass to the grantee, but, where not already outstanding in another, necessarily remains with the grantor." *Id.* at 186, 56 So. 2d at 473. Furthermore, citing *Reynold v. McMan Oil & Gas Co.*, 11 S.W.2d 778, 781 (Tex. Com. App. 1928), the court stated that "for the purpose of determining the extent of the grant, however, the distinction between reservations and exceptions is of no practical importance, since whether the one or the other the property excepted or the estate reserved is never included in the grant." *Wilson*, 213 Miss. at 187, 56 So. 2d at 473-74.

⁷⁴ *Wilson*, 213 Miss. at 187-88, 56 So. 2d at 474.

⁷⁵ See *supra* note 72 and accompanying text.

stead, the *Wilson* holding was based upon reliance on prior case law which had held that if an exception is void because it refers to an interest as having been previously conveyed to a nonexistent entity, then that interest remains with the grantor and does not pass to the grantee.⁷⁶ The *Wilson* court further found analogous support in *Cook v. Farley*.⁷⁷ *Cook* had held that an exception in favor of a stranger to the deed cannot operate as a conveyance to him of the excepted land; however, the void exception is effectual to prevent title thereto from passing to the grantee.⁷⁸

Considering the bases for its holding, *Wilson* would appear to be a limited decision which stands only for the proposition that if a "subject to" clause refers to a mineral interest as having been previously sold to a specific person or entity, then that mineral interest will be excepted from the conveyance, even if the "prior conveyance" was void or nonexistent.

Because the *Wilson* court failed to qualify the use of the "subject to" clause in that case as a *limited* means of "excepting" mineral interests, the door was left open for a later case to expand drastically the use of the "subject to" clause as a means of excepting mineral interests. In *Pfisterer v. Noble*,⁷⁹ the court did not confront a *Wilson*-type situation wherein the "subject to" clause erroneously referred to a specific but void prior conveyance. Rather, in *Pfisterer*, the "subject to" clause erroneously referred to the described interest as simply having been previously reserved or conveyed. The clause further stated, "This conveyance and warranty herein are made subject to prior reservations and conveyances of *all* the oil, gas, and other minerals in, on and under said lands."⁸⁰ The clause was misleading because the grantor in fact owned one-eighth of the minerals at the time of the deed's execution.⁸¹ The complainant argued that the "subject to" provision operated merely as a warranty protection measure as to the one-eighth minerals

⁷⁶ *Wilson*, 213 Miss. at 186-87, 56 So. 2d at 473. The court relied on *Morgan v. Collins School House*, 160 Miss. 321, 133 So. 675 (1931). That case involved an exception in a deed to one English of land previously sold to the Lebanon Church and Graveyard—nonexistent entities. The exception did not have the effect of conveying to English the land on which the Lebanon Church and Graveyard was located; rather, the land allegedly sold to the nonexistent entities was reserved from the conveyance. See *Wilson*, 213 Miss. at 186, 56 So. 2d at 473.

⁷⁷ 195 Miss. 638, 15 So. 2d 352 (1943); see *supra* notes 38-44 and accompanying text.

⁷⁸ *Wilson*, 213 Miss. at 187-88, 56 So. 2d at 474.

⁷⁹ 320 So. 2d 383 (Miss. 1975).

⁸⁰ *Id.* at 383 (emphasis added).

⁸¹ *Id.* The grantor, Magee, had previously sold all the oil, gas, and minerals, but had repurchased one-eighth prior to March 24, 1969, the date of the deed in question. *Id.*

owned by the grantor but erroneously recited as having been previously sold or reserved.⁸² In assessing this contention, the court pointed out that since no ambiguity existed in the "subject to" clause, the case was not controlled by *Richardson v. Moore*⁸³ and other cases dealing with ambiguities.⁸⁴ Accordingly, the court stated that its task was to ascertain the intent of the parties from the four corners of the deed by looking solely to the language used in the instrument itself.⁸⁵ The court then determined whether, from the four corners of the deed, the "subject to" clause should be construed as excepting *all* the minerals, including those owned by the grantor at the time of the conveyance.⁸⁶ The court relied heavily on the results reached in *Wilson v. Gerard* and *Oldham v. Fortner* for the conclusion that the one-eighth minerals owned by the grantor at the time of the conveyance should not pass to the grantee.⁸⁷ In so doing, the *Pfisterer* court held that the disputed

⁸² *Id.* at 384. The claimant argued that the deed ultimately conveyed to him the grantor's undivided one-eighth oil, gas, and mineral interest in the lands conveyed to him in the warranty deed. *Id.*

⁸³ See *supra* notes 49-55 and accompanying text.

⁸⁴ See *Pfisterer*, 320 So. 2d at 384. Citing *Payne v. Campbell*, 250 Miss. 227, 164 So. 2d 780 (1964); *Salem Brick & Lumber Co. v. Williams*, 210 Miss. 560, 50 So. 2d 130 (1951); and *Richardson v. Moore*, 198 Miss. 741, 22 So. 2d 494 (1945), the court stated that "[w]e find no ambiguity in the language before us for construction and therefore this case is not controlled by cases dealing with ambiguities." *Pfisterer*, 320 So. 2d at 384; see *supra* notes 20, 23, 24, 26 and accompanying text.

⁸⁵ *Pfisterer*, 320 So. 2d at 384. Citing *Rogers v. Morgan*, 250 Miss. 9, 164 So. 2d 480 (1964), the court stated that "[i]n construing a written instrument, the task of courts is to ascertain the intent of the parties from the four corners of the instrument." *Pfisterer*, 320 So. 2d at 384; see also *Ewing*, *supra* note 11, at 42 (intent of parties in questioned deed is to be extracted from four corners). Furthermore, citing *Welborn v. Henry*, 252 So. 2d 779 (Miss. 1971), the *Pfisterer* court noted that "[c]ourts look at the instrument under consideration as a whole and determine what the parties intended by giving a fair consideration to the entire instrument and all words used in it." *Pfisterer*, 320 So. 2d at 384. Finally, citing *Sumter Lumber Co. v. Skipper*, 183 Miss. 595, 184 So. 296 (1938), the court stated that "[w]hen a written instrument is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity, a court in construing it will look solely to the language used in the instrument itself. In such a case a court will give effect to all parts of the instrument as written." *Pfisterer*, 320 So. 2d at 384.

⁸⁶ *Pfisterer*, 320 So. 2d at 384.

⁸⁷ See *id.* Citing *Wilson v. Gerard*, 213 Miss. 177, 56 So. 2d 471 (1952) (see *supra* notes 67-74 and accompanying text), the court relied upon the holding in that case and summarized it as follows: where the controversial "subject to" clause was erroneous because it stated that the interest was previously conveyed to a nonexistent person, and where at the time of the disputed conveyance the grantor in fact owned that interest, the *Wilson* court nevertheless held that the interest remained in the grantor and did not vest in the grantee. *Pfisterer*, 320 So. 2d at 384. The *Pfisterer* court relied on *Oldham v. Fortner*, 221 Miss. 732, 74 So. 2d 824 (1954) (see *supra* notes 56-61 and accompanying

language could not logically be interpreted as a mere limitation of the grantor's warranty, as might be the case had it stated that the warranty alone was subject to prior reservations.⁸⁸ The court further reasoned that since the "subject to" clause clearly made both the conveyance and the warranty subject to prior reservations and conveyances of *all* oil, gas, and minerals, then the clause excepted *all* the mineral rights rather than only such rights as were vested in parties other than the grantor at the time of the conveyance in question.⁸⁹

In determining the intent of the parties, the *Pfisterer* court unfortunately failed to distinguish the circumstances under which the *Oldham* and *Wilson* courts had arrived at their conclusions. In *Oldham* and *Wilson*, the disputed clause erroneously referred to the mineral interest as having been previously sold or conveyed. The prior conveyance in *Oldham* to which the exception clause referred was void because of its faulty description.⁹⁰ The prior conveyance in *Wilson* to which the "subject to" clause referred was void because the grantee was fictitious.⁹¹ More importantly, in finding the prior conveyances void, both the *Oldham* and *Wilson* courts found themselves looking to the prior sale, or lack thereof, to which the disputed clauses referred.⁹² Thus, unlike *Pfisterer*, neither *Oldham* nor *Wilson* stated that the parties' intent was discerned solely from observing the language within the four corners of the deeds.

The distinguishable characteristics of *Oldham* and *Wilson* lie in the different contexts in which each court ascertained the intent of the parties. While keeping the word "intent" in mind, recall that the *Oldham* court interpreted the following exception: "except all mineral

text), for its holding that where the exception clause erroneously referred to the interest as being previously sold or conveyed, and where the interest belonged to the grantor at the time of the disputed conveyance, the clause nevertheless excepted that interest from the conveyance. *Pfisterer*, 320 So. 2d at 384. In so doing, the *Pfisterer* court stated that "[p]roperty which is excepted is not granted; it does not pass to the grantee, but, when not already outstanding in another, necessarily remains with the grantor." 320 So. 2d at 384.

⁸⁸ *Pfisterer*, 320 So. 2d at 384.

⁸⁹ *Id.* (emphasis supplied by court).

⁹⁰ See *supra* note 58 (in *Oldham*, prior conveyance to which exception clause referred was void for lack of adequate description of mineral interest).

⁹¹ See *supra* note 71 (in *Wilson*, prior conveyance to which "subject to" clause referred was void for having no grantee *in esse*).

⁹² See *supra* notes 58, 59 (*Oldham* court referred to and consulted void prior conveyance to which erroneous exception clause referred), and 71 and accompanying text (*Wilson* court considered void prior conveyance to which disputed "subject to" clause referred).

rights heretofore sold and conveyed.”⁹³ After looking beyond the disputed deed and ascertaining that the prior conveyance was in fact void, the court based its decision upon the rule that “when certain tracts excepted are specifically described, and it is further recited that they have been previously sold or conveyed, the exception will be good although the recital is false”⁹⁴ As to the matter of intent, the obvious import of *Oldham*’s reasoning is that the term “except” evidenced a clear intent that the mineral interest should be excepted from the conveyance regardless of the fact that the prior sale referred to in the exception clause was void. On the other hand, recall that the *Wilson* court interpreted the following clause: “subject to one-half interest in mineral and oil rights as conveyed to Wm. Henderson.”⁹⁵ Recall that after looking beyond the disputed deed and ascertaining that William Henderson was a fictitious prior grantee, the court made a decision based on the following rule: if an exception is void because it refers to the interest as having been previously conveyed to a non-existent entity, that interest is nevertheless excepted from the conveyance.⁹⁶ Regarding the matter of intent, the obvious import of *Wilson* is that where a “subject to” clause allegedly excepts the described interest by virtue of its reference to a void prior conveyance, the intent is that the minerals not pass to the grantee.

Such were the two distinct cases upon which the *Pfisterer* court relied with no elaboration except as to the similar results reached in the cases. As noted, the disputed clause in *Pfisterer* read as follows: “[T]his conveyance and warranty herein are subject to prior reservations and conveyances of all the oil, gas, and other minerals in, on and under said lands.” In determining that this clause excepted *all* the minerals, including the one-eighth owned by the grantor, the *Pfisterer* court failed to point out that *Oldham* involved explicit “exception” language which, when coupled with a specific but void prior conveyance, evidenced an intent that the minerals not pass to the grantee. The *Pfisterer* court also failed to point out that the *Wilson* court ascertained the parties’ intent by treating the “subject to” clause as an exception under the narrow circumstances wherein the clause referred to a prior conveyance which was void because of a fictitious grantee. The *Pfisterer* court further failed to point out that both the *Oldham* and *Wilson* courts, in determining intent, necessarily ventured from the

⁹³ See *supra* note 57 and accompanying text.

⁹⁴ See *supra* notes 58, 59 and accompanying text.

⁹⁵ See *supra* note 68 and accompanying text.

⁹⁶ See *supra* notes 76, 77 and accompanying text.

four corners of the questioned deeds and acknowledged the prior conveyance, or lack of same, to which the disputed exception or "subject to" language referred.⁹⁷

These discrepancies earmark an inherent defect in the *Pfisterer* decision. Instead of elaborating upon the extent to which it followed the *Oldham* and *Wilson* decisions, the *Pfisterer* court apparently observed the clarity of the "subject to" clause and hastily concluded that the clause, standing alone, evidenced an intent that *all* minerals were to be excepted even though the grantor still owned a part of them. This is demonstrated by the court's pronouncement that it was only giving effect to the language as it appeared within the "four corners" of the deed.⁹⁸ The *Pfisterer* court was correct in arriving at this conclusion, as courts should interpret questioned language from the four corners of a deed if possible.⁹⁹ However, in reading the *Pfisterer* decision, one does not realize that the *Pfisterer* "four corner" intent analysis incorporated by reference the underlying and distinct "venture to the specific but void prior conveyance" intent analysis used in *Oldham* and *Wilson*. Thus, the logical inference which results from *Pfisterer's* reliance on the four corners rule along with the *Oldham* and *Wilson* holdings is that *anytime* a "subject to" clause refers to *all* the minerals as having been previously conveyed or reserved, the clear intent, as determined from the four corners of the deed alone, is that *all* the minerals are intended to be excepted, regardless of the circumstances surrounding the "prior conveyance" to which a disputed "subject to" clause refers. Simply stated, *Pfisterer* seems to instruct the courts to exclude any extrinsic evidence concerning the prior conveyances, reservations, grantees, or grantors to which a "subject to" clause refers. *Pfisterer* states that if the deed recites that the conveyance is "subject to" prior disposition of *all* the minerals, then such language alone evidences a clear intent to except *all* minerals. The more ominous inference created by *Pfisterer* is that under the mandate of the four corners doctrine there is no basis for the proposition that a "subject to" clause, which erroneously refers to *all* the minerals as having been previously reserved or conveyed, may have been intended merely to protect the grantor's warranty as to any interest the grantor might still own. In other words, by virtue of the four corners rule, *Pfisterer* seemingly precludes one from arguing that if there were in fact no prior reservations, conveyances, grantors, or grantees as mentioned in the "subject to"

⁹⁷ See *supra* notes 58, 59, 71 and accompanying text.

⁹⁸ *Pfisterer*, 320 So. 2d at 384; see *supra* notes 83-86 and accompanying text.

⁹⁹ See *supra* notes 20, 23 and accompanying text.

clause, then the intent of the clause was to protect the grantor's warranty, the reason being that any resort to evidence concerning the prior reservations, conveyances, grantors, or grantees is at odds with the four corners rule.

For purposes of comparison note that the import of *Pfisterer* is that the following "subject to" clause could only be interpreted by consulting the language of the clause itself (by virtue of the four corners mandate) without consideration of the circumstances surrounding the prior conveyance or reservation to which it referred (as was the case in *Oldham* and *Wilson*):

Subject to prior reservations and conveyances of all the oil, gas and other minerals in, on and under said lands.

Now consider the following clause:

Subject to the reservation of all oil, gas and other minerals in, on and under the above described land by prior grantors.

In combining the holding of *Pfisterer* with the four corners mandate prescribed therein, would not a practitioner interpret this latter "subject to" clause, by its language alone, as showing an intent that *all* the minerals should be excepted from the conveyance? Does not this "subject to" clause in effect imply that *all* the minerals were previously reserved? Does not *Pfisterer* mandate that if a "subject to" clause states that *all* minerals have been previously reserved or conveyed, then the clear intent gathered from the language alone is that *all* minerals are intended to be excepted? More pointedly, does not *Pfisterer's* four corner stricture obviate any inclination to seek out and ascertain the intent in conjunction with the circumstances surrounding the prior reservations or grantors to which this "subject to" clause refers—even if there were no prior grantors or prior reservations and the clause was merely a warranty protection measure? Why then, in apparent disregard for the *Pfisterer* four corners intent analysis, did *Miller v. Lowery* hold that this precise "subject to" clause evidenced an intent not to withhold the minerals from the conveyance, but rather to serve merely as a warranty limitation measure for the grantor?

In an ostensible attempt to retreat from the interpretation of "subject to" clauses resulting from *Pfisterer's* hasty reliance on *Oldham* and *Wilson*, the court, in *Miller v. Lowery*,¹⁰⁰ interpreted a "subject to" clause as a warranty limitation. The clause stated that the conveyance was "subject to the reservation of all oil, gas and other

¹⁰⁰ 468 So. 2d 865 (1985).

minerals in, on and under the above described land by prior grantors.¹⁰¹ In *Miller*, Sarah Miller owned the surface and mineral estates in a certain tract of land.¹⁰² Miller subsequently conveyed fee simple title to Luke Pace in a deed which contained the aforementioned "subject to" clause.¹⁰³ Luke Pace then conveyed the property to Jerry Pace in a deed which contained the following clause: "[T]his conveyance is made subject to prior reservations of all the oil, gas, minerals in, on and under said land."¹⁰⁴ Jerry Pace subsequently conveyed the property to Lowery in a deed which contained the following clause: "[T]his conveyance is made subject to prior reservation of all the oil, gas and other minerals in, on and under the above described property."¹⁰⁵

The dispute centered around the "subject to" clause in the Miller deed and the ensuing analysis involves the court's interpretation of that clause. As will be shown, the conclusion that the clause was intended to be a simple warranty protection measure is perhaps justifiable. However, it is the confusing means by which the court ascertained the party's intent which, when compared with the simple four corners analysis mandated by *Pfisterer*, has created great discord among practitioners.

Relying on *Oldham*, *Wilson*, and *Pfisterer*, the appellants urged that the clause in the Miller conveyance operated to sever the mineral rights from the land and, in essence, contended that the "subject to" clause in the Miller deed evidenced a clear intent that *all* the minerals were to be excluded from the conveyance.¹⁰⁶ However, the appellee's position was that the "subject to" language expressed an intent only to protect the grantor's warranty¹⁰⁷ and was not intended to sever the minerals.

In distinguishing *Oldham*, the court stated that "the clause complained of in *Oldham* used the language 'excepting' rather than 'subject to.'"¹⁰⁸ The court then stated that "[t]he fact that a specific exception, if found invalid, may still operate to except a mineral interest

¹⁰¹ *Id.* at 866.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 866-87. The court acknowledged the rule applied in *Oldham* by stating that "a grantor who makes reservation or exception to his deed does not part with title to that which is excepted or reserved, such exception or reservation being good as to the property recited to have been previously sold and conveyed, even though the recital is false." *Id.* at 866.

from the deed, is not controlling in the case at bar. Here the only operative phrase is 'subject to prior reservation,' and there were no prior reservations."¹⁰⁹ This statement clearly announces that the court considered the circumstances surrounding the actual prior reservation or lack of same, to which the disputed clause referred, as a vital element of the intent analysis. Thus, it is clear that in *Miller*, just as in *Oldham*, the court ventured outside the four corners or else it would not have emphasized that there were no prior reservations. Apparently, the *Miller* court found that the absence of the term "except," when coupled with the absence of a specific but void prior conveyance mentioned in the "subject to" clause (as was the situation with *Oldham*'s exception clause) rendered the *Oldham* rule inapplicable in the *Miller* case. Recall that the rule applied in *Oldham* was that "when certain tracts excepted are specifically described and it is further recited that they have been previously sold or conveyed, the exception will be good, although the recital is false"¹¹⁰ When one disregards the *Pfisterer* "four corners" mandate used for interpreting the "subject to" clause in that case ("subject to prior reservations of all the minerals"), this distinction of *Oldham* appears to be quite sound.

The court then proceeded to distinguish *Wilson*. After noting that the "subject to" clause in *Wilson* stated that the disputed minerals had been previously sold to a specific but fictitious person, the *Miller* court stated that *Wilson* was distinguishable because it dealt with a specific exception.¹¹¹ The court stated that "although the same 'subject to' language was used in *Wilson*, the specificity of the reservation presents a factually distinguishable situation."¹¹² Apparently, the *Miller* court felt that since the "subject to" clause in issue made only a mere general reference to "prior reservations" by "prior grantors," and since extrinsic evidence proved there was no actual prior reservation, then the court could not apply the *Wilson* rationale which states that a "subject to" clause that refers to a specific but void prior conveyance may be treated as language evidencing an intent to except the de-

¹⁰⁹ *Id.* at 867.

¹¹⁰ *Oldham*, 221 Miss. at 741, 74 So. 2d at 828; see *supra* notes 60, 61 and accompanying text.

¹¹¹ *Miller*, 468 So. 2d at 867. The court acknowledged that *Wilson* involved a deed which stated that it was "subject to one-half interest in mineral and oil rights conveyed to William Henderson." *Id.* The court further stated that "it was found that Henderson was a fictitious person, but this Court allowed the clause to reserve unto the grantor title to one-half the mineral rights." *Id.*

¹¹² *Id.*

scribed interest from the conveyance.¹¹³ Once again, if one overlooks the four corners stricture imposed by *Pfisterer*, the *Miller* court's distinction of *Wilson* appears sound.

The *Miller* court then proceeded with perhaps the most baffling distinction in the opinion. In distinguishing *Pfisterer*, the court stated that the "subject to" clause in *Pfisterer* was similar to the one in the case at bar.¹¹⁴ The court admitted that in *Pfisterer* "the phrase operated to except all mineral rights reserved or conveyed before the subject deed, rather than only such rights as were vested in the parties other than the grantors at the time of the conveyance."¹¹⁵ Furthermore, the court stated that in *Pfisterer*, "[t]his Court noted that the intent of the parties is to be ascertained from the four corners of the instrument and where it is clear, explicit, harmonious and free from ambiguity, the Court will look solely to the language used in the instrument itself."¹¹⁶ However, in a confusing pronouncement—at a total variance with the *Pfisterer* four corners mandate—the court immediately thereafter stated that "[u]nlike the instant case in *Pfisterer* there were actual prior reservations of mineral rights."¹¹⁷ By these very words the court further established that it was venturing from the "four corners" in order to consult the circumstances surrounding the prior reservations and prior grantors to which the "subject to" clause in issue referred. More importantly, however, this statement is baffling because if by virtue of the four corners rule the language of the clause alone is to be consulted in order to glean the intent of the parties, what then does it matter that actual prior reservations or conveyances of mineral interests took place? Did not *Pfisterer* hold that the "subject to" language alone, by virtue of the four corners rule, evidenced a clear intent that *all* minerals were to be excluded from the conveyance—even though the grantor still owned a part of them? Yet the *Miller* court implies that the *Pfisterer* court's four corners intent determination was essentially dependent on whether actual prior reservations or conveyances existed. How can this be so if the *Pfisterer* court looked *only* to the language of the "subject to" clause itself by virtue of the four corners rule? Such is the confusion presented by the *Miller* court's dis-

¹¹³ See *supra* notes 70, 76 and accompanying text.

¹¹⁴ *Miller*, 468 So. 2d at 867. The court recited the "subject to" clause interpreted in *Pfisterer* which was as follows: "This conveyance and warranty herein remain subject to prior reservations and conveyances of all the oil, gas and other minerals in, on and under said lands." *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

tion of *Pfisterer*.

In essence, the *Miller* court would retract the principle set forth in *Pfisterer*, whereby a court may observe only the language of a "subject to" clause and determine that the intent behind the clause was to except the minerals described therein from the conveyance. This is evidenced by the *Miller* court's statement that the words "subject to" are considered the equivalent of a reservation only "where coupled with an actual prior reservation or exception," and, that "it is overreaching to state that 'subject to' standing alone is the functional equivalent of 'reserving'."¹¹⁸ The clear inference here is that either *Miller* or *Pfisterer* is inherently wrong.

Which case is correct? Is it *Pfisterer* with its "ascertain the intent from the language alone" intent analysis, or is it *Miller*, with its "there must have been an actual prior conveyance or reservation regardless of the wording of the clause" analysis? Obviously, these decisions are in hopeless conflict with regard to setting up a consistent pattern of ascertaining the intent behind a "subject to" clause which erroneously states that *all* the minerals have been conveyed or reserved on a prior occasion. On the one hand, *Pfisterer* states that where a "subject to" clause refers to *all* the minerals as having been previously reserved or conveyed, the intent (as discerned from the language of the clause alone) is that any interest still owned by the grantor is to be excepted from the conveyance. On the other hand, *Miller*, by virtue of its distinction of *Pfisterer*, suggests that where a "subject to" clause refers to *all* the minerals as being previously reserved or conveyed, an intent to except the minerals from the conveyance may not be discerned from only the language of the clause itself. Rather, such an intent determination necessarily requires the court to venture beyond the four corners and ascertain whether in fact there existed the actual prior reservations to which the "subject to" clause refers. But, once again, what does it matter whether there in fact existed the prior reservations or conveyances if the intent to exclude all minerals from the conveyance can be discerned solely from the language of the "subject to" clause itself as the *Pfisterer* court held?

The aforementioned discussion is based on the conflicts which have arisen from the *Miller* court's confusing inclination to limit *Pfisterer*'s four corner intent analysis to those cases where there in fact exists an actual prior reservation or conveyance to which the disputed "subject to" clause refers. The question which remains unanswered, however, is why did the *Miller* court distinguish *Pfisterer* in this re-

¹¹⁸ *Id.*

spect? The answer to this question lies hidden somewhere in the following announcement by the *Miller* court: "We find that this clause is not, nor has it ever been, sufficient to reserve mineral rights without a formal severance."¹¹⁹ This statement further aggravates the conflict between *Pfisterer's* mandate to ascertain the intent behind a "subject to" clause from its language alone and the *Miller* court's compulsion to seek out the circumstances surrounding the prior reservations or prior conveyance to which the "subject to" clause refers. Is there now a new requirement that a court must always venture from the four corners and consider the existence of and the circumstances surrounding the prior reservation or prior conveyance to which a disputed "subject to" clause refers before it can decide that the grantor intended to except or reserve the interest from the conveyance? Is the *Miller* court saying that there was a "formal severance" in *Wilson* wherein the "subject to" clause operated to except the interest which was stated to have been sold to a grantee who did not exist? Is "conveying" minerals to a fictitious grantee a "formal severance"? Must a court, when confronted with a disputed "subject to" clause, necessarily consult the entire property record and look for a prior reservation or conveyance in order to determine from the language itself (pursuant to the four corners rule) that the grantor intended to except the interest described in the "subject to" clause? If the answer to this last question is yes, then *Pfisterer* must be totally wrong, since it held that such an intent to except the described interest could be ascertained from the language alone in the "subject to" clause. The crucial point here is that if the requisite intent to except the minerals can be found in the language alone of a "subject to" clause, as *Pfisterer* dictates, what then does it matter whether there was or was not a prior reservation or conveyance or, for that matter, a "formal severance"? Is it not true that a valid reservation or exception automatically effects a severance of the described interest upon execution of the deed?¹²⁰ Surely it would follow that if a "subject to" clause is held to be a device intended to except the mineral interest described therein, then such an exception would also act to sever the minerals from the surface.

¹¹⁹ *Id.*

¹²⁰ See *West*, 183 So. 2d at 826 (where erroneous reservation in deed was sufficient to reserve and except mineral estate, there was severance of that estate from surface ownership); *Cook*, 195 Miss. at 640, 15 So. 2d at 356 (in grant of land reserving or excepting minerals, separate estate is created in them by way of legal exception as they already exist in land; authorities uniformly recognize that such retention of the minerals under land is legally an exception and that separate legal interest or estate in them is created by exception).

CONCLUSION

The object of confusion presented by the *Miller* decision seems to be in the manner of ascertaining the parties' *intent*. There must be a reason why the *Miller* court imposed the requirement that a prior formal severance exist before a "subject to" clause can evidence an intent to except the interest described therein from the conveyance. One can only surmise that the *Miller* court was trying to say that the "subject to" clause was not a valid exception and, as such, did not sever the minerals because it was not *intended* to except the minerals from the *Miller* conveyance. But how did the court determine that the clause was not intended to except the minerals from the conveyance? The *Miller* court obviously applied full scale *ambiguity* treatment when determining the intent behind the clause, complete with a venture beyond the language itself. This is evidenced by the court's extensive reliance on the absence of the prior reservations and prior grantors referred to by the "subject to" clause, not to mention the consideration of detailed arguments concerning extrinsic testimony and evidence presented in the litigants' briefs.¹²¹ Such an ambiguity intent analysis is diametrically opposed to the four corners intent analysis used in *Pfisterer*. This is confusing since the "subject to" clause in each case stated that *all* the minerals were previously reserved or conveyed.

Because the *Miller* court was confronted with a clause which was not sufficiently clear enough at first sight to evidence an intent to except the described minerals (as was the case in *Pfisterer*), the court went about finding a way to justify its urge to consider the circumstances surrounding the prior reservation and prior grantors to which the "subject to" clause referred. The court seems to have come up with a name for this excuse to venture beyond the language of the "subject to" clause for purposes of ascertaining its intent. That name is "formal severance." Were it not to justify this compulsion to interpret the clause in accordance with the circumstances surrounding the prior reservation and prior grantors referred to by the clause, why else would the court have stated that "this [subject to] clause is not, nor has it ever been, sufficient to reserve mineral interests without a formal sev-

¹²¹ See Brief of the Appellee, 4, *Miller v. Lowery*, 468 So. 2d 865 (Miss. 1985) (argument that no stamp taxes paid showed intent not to withhold minerals or sever them from estate); see also *id.* at 4, 7 (argument that "based upon evidence, oral and documentary, with due consideration of the credibility of each witness presenting oral evidence, the Chancellor was correct in his ruling"; Miller's intent to only protect warranty was evidenced by testimony of attorney who drafted deed for Miller).

erance"?¹²² Was there a formal severance in *Wilson*? How can a conveyance made to a nonexistent grantee effect a formal severance? Was there a formal severance in *Pfisterer*? What would it matter since the *Pfisterer* court ascertained from the language only in the "subject to" clause that *all* minerals were intended to be excluded from the conveyance?

The *Miller* decision has created great confusion for those who practice and study the oil and gas law of Mississippi. Is the question of whether a "subject to" clause is a device intended to except an interest a question of intent, or is it a question necessarily involving the existence of a "formal severance"? Can a court discern from the language *alone* of a "subject to" clause that the grantor intended to except the minerals rather than protect his warranty as to the interests not actually previously reserved or conveyed? Or, on the other hand, is there now a requirement which makes the effectiveness of a "subject to" clause (allegedly acting as a means of exception) contingent on the existence of specific prior reservations or conveyances referred to by the "subject to" clause? As noted, these conflicts have arisen due to the *Miller* court's implicit treatment of the "subject to" clause in that case as ambiguous. Would it not have been simpler to state that the clause was ambiguous in that the intent to except the disputed minerals could not be clearly observed in the language alone? This would leave the *Pfisterer* decision intact. However, the *Miller* court has now imposed a severe restriction on the intent finding process to which courts must adhere when ascertaining the intent behind a "subject to" clause. The *Pfisterer* four corners mandate is apparently overruled. The reason is that a court must now seek evidence beyond the language of the clause to determine whether there was a "formal severance"—whatever that may be—in order to ascertain whether the intent behind the clause is to except the interests described therein or to protect the warranty as to those interests. Until these cases are clarified, and until the court carefully delineates the proper usage and interpretation of "subject to" clauses, practitioners will remain confused as to when a "subject to" clause will operate as an exception and not a warranty limitation measure.

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¹²² *Miller*, 468 So. 2d at 867.

INFORMED DECISIONMAKING BY DIRECTORS: THE DIRECTOR'S RIGHT TO RELY VERSUS THE DUTY TO INVESTIGATE

Many corporate directors feel they hold an honorary position which does not require that they be fully informed concerning the acts of their corporation.¹ Recently, directors have been surprised to find that they could not rely solely on information provided by their subordinates² and to discover that the price of an uninformed decision may be crushing personal liability.³

Directors, as fiduciaries,⁴ owe a duty of care to their corporation.⁵

¹ See, e.g., *Lutz v. Boas*, 39 Del. Ch. 585, 171 A.2d 381, 395-96 (1961)(directors did not appreciate obligations of their office); *Kavanaugh v. Gould*, 223 N.Y. 103, 119 N.E. 237, 238 (1918)(director's position neither honorary nor without responsibilities); see also *Briggs v. Spaulding*, 141 U.S. 132, 156-57 (1891)(director asserted he was part-time, advisory director); *Gibbons v. Anderson*, 80 F. 345, 349-50 (W.D. Mich. 1897)(directors are not ornamental); *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777, 779 (1913)(some directors consider themselves figureheads only).

² See, e.g., *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36, 41-44 (1979)(excessive reliance in large transaction was negligent); see also *Smith v. Van Gorkom*, 488 A.2d 858, 874-77 (Del. 1985)(denied director's right to rely solely on report by officers). See generally *Corporate Director's Guidebook*, 33 Bus. Law 1591, 1609, 1611 (1978)(suggesting that directors occasionally need to seek outside advice).

³ See *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985)(directors liable in context of merger); *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777, 779 (1913)(figureheads may awake to find liability).

⁴ E.g., *United States v. Byrum*, 408 U.S. 125, 137-38 (1972)(directors have fiduciary duty to protect corporate interests); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949)(directors are fiduciaries); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 42 (3d Cir. 1947)(directors have fiduciary duty to corporation); *Southern Cal. First Nat'l Bank v. Quincy Cass Assocs.*, 3 Cal. 3d 667, 478 P.2d 37, 43, 91 Cal. Rptr. 605 (1970)(director owed fiduciary duty to shareholder); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)(directors have fiduciary duties); *Ellzey v. Fyr-Pruf, Inc.*, 376 So. 2d 1328, 1332 (Miss. 1979)(directors are fiduciaries).

⁵ *Selheimer v. Manganese Corp.*, 423 Pa. 563, 224 A.2d 634, 640-43 (1966)(discussing director's duty of care). This duty of care may arise from either common law or statutory law. *Id.* See generally Stern, *The General Standard of Care Imposed on Directors Under the New California General Corporation Law*, 23 UCLA L. REV. 1269, 1269-75 (discussing duty imposed by common law and by statute).

The standard of care varies from state to state. Some states require only that directors avoid being grossly negligent. *Allison ex rel. General Motors Corp.*, 604 F. Supp. 1106, 1122 (D. Del. 1985)(uninformed decision must be grossly negligent); *Pennsylvania Mart Realty Co. v. Becker*, 298 A.2d 349, 350-51 (Del. Ch. 1972)(gross negligence standard). See generally Veasey & Manning, *Codified Standard—Safe Harbor or Uncharted*

To fulfill this duty, directors must make informed decisions.⁶ The law allows directors to rely on certain persons when acquiring information.⁷ Unquestionably, if a director suspects wrongdoing by someone, reliance

Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law, 35 BUS. LAW. 919, 926-30 (1980)(discussing Delaware's development of gross negligence standard)[hereinafter cited as Veasey & Manning]. Other states require directors to exercise ordinary care. *Harman v. Willbern*, 374 F. Supp. 1149, 1161-62 (D. Kan. 1974)(reasonable care standard), *aff'd*, 520 F.2d 1333 (10th Cir. 1975); CAL. CORP. CODE § 309(a)(West 1977)("care . . . an ordinarily prudent person . . . would use . . ."); N.Y. BUS. CORP. LAW § 717 (McKinney Supp. 1984)(same). See generally Cary & Harris, *Standards of Conduct Under Common Law, Present Day Statutes and the Model Act*, 27 BUS. LAW 61, 72 (1972)(discussing different standards).

⁶ *Harman v. Willbern*, 374 F. Supp. 1149, 1162-63 (D. Kan. 1974), *aff'd*, 520 F.2d 1333 (10th Cir. 1975); *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); MODEL BUS. CORP. ACT § 8.30 comment at 222 (1984); *cf.* *Allied Freightways v. Cholfin*, 325 Mass. 630, 91 N.E.2d 765, 768 (1950)(wilful ignorance of director would breach duty); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N.E. 42, 44 (1930)(director must keep informed about corporation). This duty to become informed arises from the obligation of a fiduciary to protect those interests he represents. *Allison ex rel. General Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del. 1985). A director's business judgments receive the deferential treatment of the business judgment rule only if the director made an informed business judgment. *Whittaker Corp. v. Edgar*, 535 F. Supp. 933, 950 (N.D. Ill. 1982); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. Supr. 1985); see also 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1040 (1986)(business judgment rule does not excuse ignorance); *cf.* *Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769, 776 (1967)(lack of reasonable basis for decision).

⁷ See, e.g., *Warner v. Penoyer*, 91 F. 587, 591 (2d Cir. 1898)(bank directors were reasonable in relying on cashier's competence and skill); *Buffalo Forge Co. v. Ogden Corp.*, 555 F. Supp. 892, 904 (W.D.N.Y. 1983)(reliance on experts in merger was reasonable); *Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229, 1242, 1244 (N.D. Ga. 1979)(reliance on officers); N.Y. BUS. CORP. LAW § 717 (McKinney Supp. 1984)(directors may rely on officers, experts, and committees).

The director's right of reliance should be contrasted with his duty to supervise the management of the corporation. *Lowell Hoit & Co. v. Detig*, 320 Ill. App. 179, 50 N.E.2d 602, 603 (1943)(director's right to rely on subordinates does not eliminate duty to supervise). While directors may rely on others for the purpose of becoming informed, the directors must continue to monitor their subordinates. *Corporate Director's Guidebook*, *supra* note 2, at 1603; see *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897, 900 (1915)(completely entrusting management to subordinates is breach of trust); *Fletcher v. Eagle*, 74 Ark. 585, 86 S.W. 810, 811 (1905)(directors breached duty by committing total management to president); *Trembert v. Mott*, 271 Mich. 683, 261 N.W. 109, 114 (1935)(while directors may rely on subordinates for some matters, directors must continue to supervise); *Ellis v. H.P. Gates Mercantile Co.*, 103 Miss. 560, 60 So. 649, 650-51 (1913)(director's completely abstaining from management breached duty of supervision). See generally Handler & Christy, *Texas Corporate Directors' Standard of Care and Right to Rely: A Proposed Modification*, 8 TEX. TECH. L. REV. 291, 313-21 (1976)(explaining duty of supervision and contrasting it with duty of care).

on that person without any investigation is unreasonable.⁸ This comment will discuss whether a director must investigate the competency, reliability, or accuracy of others before relying on them when the director has no suspicion which causes his reliance to be unreasonable.⁹ The comment will examine the common-law right of reliance,¹⁰ the statutory right,¹¹ and factors which courts have considered in deciding whether reliance was reasonable.¹² Finally, the comment will conclude that the most important factors should be the size and the frequency of the transactions which the director is to consider.¹³

I. COMMON-LAW RIGHT OF RELIANCE

Because corporate affairs are so complex and voluminous, requiring directors to investigate all information they receive would bring business to a standstill.¹⁴ Accordingly, the common law allows directors to rely on their subordinates' honesty and competency¹⁵ absent some

⁸ *Ringeon v. Albinson*, 35 F.2d 753, 755 (D. Minn. 1929)(warnings of examiner and knowledge of incompetence of officers prevented any reliance on officers); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N.E. 42, 45 (1930)(directors may rely on officers absent grounds for suspicion); *Swentzel v. Penn Bank*, 147 Pa. 140, 23 A. 405, 413 (1892)(suspension of bank put directors on notice and prevented reliance on president); MODEL BUS. CORP. ACT § 8.30(c)(1984)(directors may not rely while knowing of suspicious circumstances).

⁹ The question is when does a director's fiduciary duty outweigh his right of reliance. For example, MODEL BUS. CORP. ACT § 8.30(c)(1984) provides that a director may not in good faith rely on a subordinate if the director knows of any fact making reliance unwarranted. *Id.* Additionally, a director must exercise reasonable care in relying on others. *Id.* § 8.30(a)(2). If reasonable care is to have any meaning, it must encompass something beyond notice of suspicious circumstances.

Moreover, in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), the Supreme Court of Delaware held that directors were not entitled to rely on their subordinates, *id.* at 875, even though the directors did not know their subordinates were uninformed. *See id.* at 897 (McNeely, J., dissenting). The court held the directors still had to make some type of investigation. *Id.* at 875.

¹⁰ *See infra* notes 14-21 and accompanying text.

¹¹ *See infra* notes 22-49 and accompanying text.

¹² *See infra* notes 50-75 and accompanying text.

¹³ *See infra* notes 76-84 and accompanying text.

¹⁴ CAL. CORP. CODE § 309 comment at 27-28 (West Supp. 1986); *see Briggs v. Spaulding*, 141 U.S. 132, 162-63 (1891)(recognizing directors had to rely on someone); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N.E. 42, 45 (1930)(nature of banking business required directors to rely on subordinates); *Ellis v. H.P. Gates Mercantile Co.*, 103 Miss. 560, 60 So. 649, 650 (1913)("directors . . . do and must commit the details of . . . business to . . . officers . . .").

¹⁵ *Dresser v. Bates*, 250 F. 525, 530, 534 (1st Cir. 1918), *modified*, 251 U.S. 524 (1920)(director entitled to rely on cashier to perform work properly); *see also Graham v.*

ground for suspicion.¹⁶

In the leading case in this area, *Briggs v. Spaulding*,¹⁷ the receiver of a bank sued the directors for negligently relying on the president.¹⁸ The directors relied upon the president's representations that the bank was doing well;¹⁹ however, the president's dishonest activities soon caused the bank's insolvency.²⁰ In holding for the directors, the United States Supreme Court stated directors need not spy on their subordinates; instead, directors can rely on the honesty of those subordinates until reason for suspicion exists.²¹

Allis-Chalmers Mfg. Co., 41 Del. 78, 188 A.2d 125, 130 (1963)(director entitled to rely on honesty of subordinates); Prudential Trust Co. v. Brown, 271 Mass. 132, 171 N.E. 42, 45 (1930)(director could rely on competency of officers); Martin v. Hardy, 251 Mich. 413, 232 N.W. 197, 198 (1930)(director entitled to rely on ability of manager); Swentzel v. Penn Bank, 147 Pa. 140, 23 A. 405, 412 (1892)(director could rely on cashier and officer); cf. Cornick v. Weir, 212 Iowa 715, 237 N.W. 245, 251 (1931)(recognizing directors must entrust subordinates with daily affairs); Mason v. Moore, 73 Ohio St. 275, 76 N.E. 932, 936 (1906)(directors are not insurers of honesty of subordinates); Devlin v. Moore, 64 Or. 433, 130 P. 35, 45 (1913)(directors do not guarantee honesty and skill of subordinates).

¹⁶ Warner v. Penoyer, 91 F. 587, 590 (2d Cir. 1898)(directors may rely on honesty of subordinates absent any suspicion); Federal Deposit Ins. Corp. v. Boone, 361 F. Supp. 133, 165-66 (W.D. Okla. 1972)(absent suspicion, directors not liable for officers' wrongs); Sternberg v. Blaine, 179 Ark. 448, 17 S.W.2d 286, 290 (1929)(absent suspicion, no duty to investigate honesty of cashier); Ferris v. Polycast Technology Corp., 180 Conn. 199, 429 A.2d 850, 853 (1980)(absent suspicion, reliance on officers is reasonable); Edystone v. Salmon Falls Mfg. Co., 84 N.H. 315, 150 A. 545, 547 (1930)(absent suspicion, director had no duty to investigate agent); cf. Taylor v. Alston, 79 N.M. 643, 447 P.2d 523, 524 (Ct. App. 1968)(directors must have notice before liable for officer's wrongs).

¹⁷ 141 U.S. 132 (1891).

¹⁸ *Id.* at 134, 139.

¹⁹ *Id.* at 156-58.

²⁰ *Id.* at 158.

²¹ *Id.* at 162-64. *Briggs* also involved a failure by the directors to supervise. *Id.* at 166 (Harlan, J., dissenting). Several courts have criticized the majority opinion in *Briggs* for allowing such reliance by the directors. See, e.g., Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S.W. 803, 810 (1917)(adopting dissent in *Briggs*); Anderson v. Bundy, 161 Va. 1, 171 S.E. 501, 507 (1933)(approving interpretation of duty of supervision as stated in *Briggs* dissent). However, the right of reliance set forth in *Briggs* is actually distinct from the duty of supervision and is thus still cited favorably by other courts. See, e.g., Graham v. Allis-Chalmers, 41 Del. 78, 188 A.2d 125, 130 (1963)(directors entitled to rely under *Briggs*). Most of the cases which seem to reject *Briggs* do not address the right of reliance, but are based instead on an egregious breach in the duty of supervision. See Lippett v. Ashley, 89 Conn. 451, 94 A. 995, 1000 (1915)(duty of supervision arises apart from suspicious circumstances); Campbell v. Watson, 62 N.J. Eq. 396, 50 A. 120, 132 (1901)(observing duty of supervision based on experience, not on suspicion of employees). While *Briggs* addresses the right of reliance of bank directors in particular, it has also been applied to directors of corporations in general. See, e.g., Graham v. Allis-Chalmers Mfg. Co., 41 Del. 78, 188 A.2d 125, 128, 130 (1963)(directors of electrical equipment

II. STATUTORY RIGHT OF RELIANCE

Legislatures have recognized the importance of a director's right of reliance²² and have responded by enacting reliance statutes.²³ Often these statutes provide specific instances when directors may rely on others;²⁴ for example, a director in Mississippi may rely on the corporate financial statements represented as correct by the officer in charge of the corporate books.²⁵

The trend today, as shown by section 8.30 of the Model Business Corporations Act, is toward a statutory right to rely²⁶ in all instances.²⁷

manufacturer allowed to rely; expressly based on *Briggs*); *Lowell Hoit & Co. v. Detig*, 320 Ill. App. 179, 50 N.E.2d 602, 602 (1943)(directors of grain company had right to rely); *Martin v. Hardy*, 251 Mich. 413, 232 N.W. 197, 197 (1930)(reliance by directors of mercantile company). See generally 3A W. FLETCHER, *supra* note 6, § 1085 (*Briggs* rationale applies to banks and other corporations).

²² CAL. CORP. CODE § 309 comment at 27 (West Supp. 1986). For business to continue, directors must be able to trust those who are in management. *Id.* Since corporate matters which directors must consider are becoming increasingly complex, the director's right to rely on others is becoming broader. MODEL BUS. CORP. ACT § 35 comment (1977), reprinted in *Corporate Director's Guidebook*, *supra* note 2, at 1631. Compare MASS. GEN. LAWS ANN. ch. 156B, § 65 (West 1970)(amended 1980)(allowing reliance upon corporate books and written reports) with MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 1985)(allowing reliance upon information, opinions, reports, and records from employees of corporation, professionals, experts and committees).

²³ See, e.g., CONN. GEN. STAT. ANN. § 33-313 (West Supp. 1985); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West Supp. 1985); MINN. STAT. ANN. § 302 A. 251 (West 1985); TENN. CODE ANN. § 48-1-813 (1984).

²⁴ E.g., a director is protected if he reasonably relied in good faith on the written opinion of an attorney for the corporation. TEX. BUS. CORP. ACT. ANN. art. 2.41(D)(Vernon 1980). When distributing assets to shareholders or when declaring dividends, a director may rely on both the balance sheet and the profit and loss statement. ILL. ANN. STAT. ch. 32, § 8.65(c)(Smith-Hurd 1985). Directors may rely on financial statements if an officer in charge of the statements or an accountant certifies that the financial statements are correct. *Id.*; WASH. REV. CODE ANN. § 23A.08.450(5)(1969). See generally MODEL BUS. CORP. ACT ANN. 2d § 35 ¶ 3.03(3)(b)(Supp. 1977)(detailing statutes giving right of reliance in certain circumstances).

²⁵ MISS. CODE ANN. § 79-3-91(e)(1972). Since § 91(e) addresses a very limited decision by directors and since it does not expressly or impliedly overrule the common law, the common-law right of reliance should apply in Mississippi. See *Sanders v. Neeley*, 197 Miss. 66, 19 So. 2d 424, 426-27 (1944) (common-law right of stockholders applies unless statute expressly or impliedly overrules it); see also *Tuggle v. Williamson*, 450 So. 2d 93, 95 (Miss. 1984)(common law applies except where changed by statute); *City of Jackson v. Wallace*, 189 Miss. 252, 196 So. 223, 225 (1940)(statutes supplemented by common law where consistent).

²⁶ See *Corporate Director's Guidebook*, *supra* note 2, at 1632. As the volume and complexity of corporate affairs has increased, the director's right of reliance has increased. *Id.* Since limiting the director's right of reliance to specific circumstances can no

Section 8.30 provides that directors may rely on information from employees, professionals and committees who the directors reasonably believe are reliable, if the director has no knowledge making reliance unwarranted.²⁸

Under section 8.30, a director must exercise reasonable care when relying on a person.²⁹ Normally, investigating this person prior to the act of reliance is not necessary unless the director knows of facts which would cause reliance to be unreasonable.³⁰ However, by providing that directors' duties vary with the circumstances,³¹ the comments to section 8.30 suggest that some directors may have to make an investiga-

longer be justified, the director's right of reliance under MODEL BUS. CORP. ACT ANN. 2d § 35 (Supp. 1977)(the forerunner of § 8.30) covers all director activity. *Corporate Director's Guidebook*, *supra* note 2, at 1632. The intent behind § 35 was to broaden the situations in which and information upon which a director could rely. *Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act*, 30 BUS. LAW. 501, 504 (1975). As an example of the trend from limited reliance statutes to broad reliance statutes, compare N.Y. BUS. CORP. LAW § 717 (McKinney 1963)(amended 1984)(allowing reliance on financial statements represented as correct by officer or accountant) with N.Y. BUS. CORP. LAW § 717 (McKinney Supp. 1984)(allowing reliance on any information from officers, employees, professionals, and committees).

²⁷ MODEL BUS. CORP. ACT. § 8.30(b) comment at 223 (1984).

²⁸ *Id.* § 8.30(b)-(c). The section provides the following:

In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
- (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
- (3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted . . . unwarranted.

Id.

²⁹ *Id.* § 8.30(b) comment at 223.

³⁰ *Id.* at 222-23. A director will not fulfill his duty of good faith if he relies while knowing of facts which make reliance unwarranted. *Id.* § 8.30(c). Since a director must also exercise reasonable care when relying, § 8.30 implies that a director may not be entitled to rely on others even when the director does not have knowledge of facts making reliance unwarranted. If the reasonable care requirement is to have any meaning, it must cover something beyond the area covered by the good faith requirement in § 8.30(c). *Cf. Smith v. Van Gorkom*, 488 A.2d 858, 875 (Del. 1985)(reliance unreasonable under circumstances though no knowledge of facts indicating officers were unreliable).

³¹ MODEL BUS. CORP. ACT § 8.30 comment at 222 (1984). Even though a director does not know of facts which would make reliance unreasonable, the comments to § 8.30 suggest that, as a director gains expertise, his right to rely may decrease. *Id.*

tion even though they do not know of suspicious circumstances.³²

Some states have wanted to ensure that under their state reliance statutes the common-law standard of inquiry notice applied.³³ Thus, concerned that the Model Business Corporations Act³⁴ might impose a duty of inquiry even where there was no suspicion by directors,³⁵ the California Legislature phrased section 309 of the California Corporations Code³⁶ to require a reasonable inquiry by directors only when suspicious circumstances existed.³⁷ In *Graham v. Allis-Chalmers*,³⁸ the Delaware Supreme Court held that reliance statutes which do not address when the duty of investigation arises, such as title 8, section 141(e) of the Delaware Code,³⁹ are supplemented by common law.⁴⁰ Ac-

³² *Id.* Thus § 8.30 appears to allow less reliance than the common-law right of reliance. See *supra* notes 15-16 and 21. Perhaps the overlap among the duties of good faith and reasonable care and the right of reliance in § 8.30 takes into account the duty of supervision which directors owe to their corporation. See Handler & Christy, *supra* note 7, at 313-20 (discussing ambiguity of and relationship among duties of care and supervision and right of reliance in Model Act).

³³ *E.g.*, CAL. CORP. CODE § 309 comment at 222 (West Supp. 1977)(intent was not always to require investigation by director); WASH. REV. CODE ANN. § 23A.08.343 (Supp. 1986)(director must investigate only when circumstances require).

³⁴ MODEL BUS. CORP. ACT § 8.30 (1984). The nearly identical forerunner of § 8.30 was MODEL BUS. CORP. ACT ANN. 2d § 35 (Supp. 1977).

³⁵ CAL. CORP. CODE § 309 comment at 27 (West Supp. 1984).

³⁶ CAL. CORP. CODE § 309 (West Supp. 1979). The legislature omitted the requirement of § 35 that a director have a reasonable belief in another's competency and reliability. CAL. CORP. CODE § 309 comment at 27 (West Supp. 1984). There was a fear that requiring a reasonable belief would always require a director to investigate the competence and reliability of a subordinate before relying. *Id.* The legislature did not intend to impose a duty of inquiry under all circumstances. *Id.*

³⁷ *Id.* § 309 (West Supp. 1979). Under § 309, directors must satisfy several requirements in order to justifiably rely on others: directors must act in good faith, with a reasonable inquiry when the circumstances require, and without knowledge which makes reliance unwarranted. *Id.* § 309(b). If the second requirement—a reasonable inquiry when the circumstances require—has any meaning apart from the third requirement—knowledge making reliance unwarranted—then § 309 provides less protection than common law. See *supra* notes 16 and 21.

³⁸ 41 Del. 78, 188 A.2d 125 (1963).

³⁹ DEL. CODE ANN. tit. 8 § 141(e)(1974):

A member of the board of directors . . . shall, in the performance of his duties, be fully protected in relying in good faith upon the books of account or reports made to the corporation by any of its officers, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the board of directors or by any such committee, or in relying in good faith upon other records of the corporation.

Id. Some commentators assert that § 141(e) does not differ in any important way from the MODEL BUS. CORP. ACT ANN. 2d § 35 (Supp. 1977), the forerunner of § 8.30. Veasey & Manning, *supra* note 5, at 944. While § 35 is broader on its face than § 141(e), the courts

cordingly, the court held that directors have no duty to investigate their subordinates unless the directors have notice of suspicious circumstances.⁴¹ Therefore, the directors could rely on their subordinates to be honest and not to violate the antitrust laws.⁴² However, in *Smith v. Van Gorkom*,⁴³ the court showed much less deference to directors' reliance. The court held that in approving a merger⁴⁴ the directors could not rely on information from officers⁴⁵ but had a duty of inquiry,⁴⁶ even though the directors did not know of any improper performance by those officers.⁴⁷ By use of hindsight,⁴⁸ the court construed

of Delaware have allowed reliance on persons not mentioned in § 141(e). Veasey & Manning, *supra* note 5, at 944 n.115 and accompanying text; see *Cheff v. Mathes*, 41 Del. 494, 199 A.2d 548, 556 (1964)(court implied reliance on financial advisor outside scope of § 141(e) was reasonable); *Kors v. Casey*, 39 Del. Ch. 47, 158 A.2d 136, 141 (1960)(court observed that directors sought advice from professors and businessmen outside scope of § 141(e)).

⁴⁰ *Graham*, 188 A.2d at 130 (citing *Briggs*); cf. *Smith v. Van Gorkom*, 488 A.2d 858, 881 n.22 (Del. 1985)(recognizing that statutory right of reliance is not exclusive); CAL. CORP. CODE § 309 comment at 28 (West Supp. 1986)(statutory right not exclusive).

⁴¹ *Graham*, 188 A.2d at 130. The court stated that a director may not ignore "obvious danger signs of employee wrongdoing." *Id.* As soon as a director knows of suspicious circumstances, the director must investigate before relying. *Id.* Absent any suspicion, a director may assume employees are honest. *Id.*

⁴² *Id.*

⁴³ 488 A.2d 858 (Del. 1985).

⁴⁴ *Id.* at 866-67. The chief executive officer secretly negotiated a merger. *Id.* He called a surprise meeting of the board of directors, presented a twenty-minute oral report in favor of the merger, and told the directors that approval was needed immediately. *Id.* at 867-69. While he failed to tell the directors that no proper valuation study had been done, the chief financial officer told the directors that the price per share was fair. *Id.* at 868-69.

⁴⁵ *Id.* at 875. The court held that given the circumstances—a surprise meeting, no prior deliberations on the possibility of or need for a merger, a strict time schedule, and no documentation—the directors could not rely solely upon what the officers said. *Id.*

⁴⁶ *Id.* The court stated that if the directors had questioned the officers, the directors would have discovered that the valuation study was improperly done. *Id.* at 877.

⁴⁷ *Id.* at 877. The directors did not know the valuation study was improperly done. *Id.* Furthermore, the valuation study was represented as fair. *Id.*

⁴⁸ See *id.* at 875. The court held that the chief executive officer's statement was not a report that could be relied upon under § 141(e), since the statement lacked substance because the chief executive officer was uninformed. *Id.* The proper question, however, was not whether the chief executive officer was uninformed, but whether the directors should have known that he was uninformed. In other words, the court should have asked whether the report on its face indicated a lack of substance. The court said the directors must take a critical view of any information provided to them in the merger context of *Smith*. *Id.* at 872. However, there was no proof that the information provided by the chief executive officer was facially weak; on the contrary, such experienced directors would have immediately noticed any inconsistencies in the report itself. *Id.* at 894

section 141(e) of the Delaware Code to allow less reliance than that allowed by the common law.⁴⁹

III. FACTORS THE COURTS CONSIDER IN DECIDING WHETHER RELIANCE WAS JUSTIFIED

While the courts weigh all the circumstances in deciding whether reliance was reasonable,⁵⁰ certain factors are repeatedly discussed.

A. *Characteristics of the Person on Whom the Directors Rely*

The courts consider whether the person has performed well in the past⁵¹ and whether he possesses expertise or experience in the given area.⁵² Courts also look to whether that person has a favorable reputation in the given area or for honesty and for competence generally.⁵³ Another factor consistently noted is whether the person in question has a personal interest in performing properly or in giving correct

(McNeilly, J., dissenting)(such experienced directors are not tricked by "fast shuffle").

The court's denying a right of reliance to the directors was unjust in *Van Gorkom*, since § 141(e) expressly provided for reliance on officers and since the report did not indicate a lack of support on its face. Since the directors did not know of any suspicious conduct by the chief executive officer, the directors were entitled to rely on the report. See *Graham*, 188 A.2d at 130 (directors may rely on reports absent suspicion of some wrongdoing).

⁴⁹ See *supra* notes 16 and 21 and accompanying text.

⁵⁰ *Martin v. Hardy*, 232 N.W. at 198; see *Van Gorkom*, 488 A.2d at 872 (under circumstances, directors had duty of inquiry); *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777, 779 (1913)(diligence required depends on circumstances); MODEL BUS. CORP. ACT § 8.30 comment at 222-23 (whether reliance was reasonable depends on circumstances).

⁵¹ See, e.g., *Briggs*, 141 U.S. at 159 (president conducted business well in the past); *Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639, 653 (Iowa 1979)(directors had learned to rely on skill and judgment of management).

⁵² *Panter v. Marshall Field & Co.*, 646 F.2d 271, 297 (7th Cir. 1981)(directors were reasonable in relying on experienced antitrust advisor); *Buffalo Forge Co. v. Ogden Corp.*, 555 F. Supp. 892, 904 (W.D.N.Y. 1983)(reliance on counsel experienced in acquisitions and mergers was reasonable); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N.E. 42, 46 (1930)(treasurer was experienced banker).

⁵³ See, e.g., *Harmon v. Willbern*, 374 F. Supp. 1149, 1164 (D. Kan. 1974)(director could rely on officers with reputation for honesty, integrity and skill), *aff'd*, 520 F.2d 1333 (10th Cir. 1975); *F.D.I.C. v. Boone*, 361 F. Supp. 133, 160 (W.D. Okla. 1972)(director was religious and had reputation for honesty); *Mobley v. Faulk*, 42 Ga. App. 314, 156 S.E. 40, 42 (1930)(financial agent had reputation for being honest, trustworthy and experienced); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N.E. 42, 46 (1930)(treasurer had reputation for being trustworthy and skillful); *Swentzel v. Penn Bank*, 147 Pa. 140, 23 A. 405, 415 (1892)(officers had reputation for honesty).

information.⁵⁴

B. Characteristics of the Company

If the company has a large number of employees and if the company's activities are spread over a large geographic area, directors can know only a few of their subordinates and may be entitled to rely more on subordinates than directors in a small company are entitled to rely.⁵⁵ The courts also consider whether the magnitude of the company's business effectively limits the directors' activities to policy decisions.⁵⁶ In such a large business, the directors are normally unable to make a personal investigation before making their decisions.⁵⁷ Recognizing that different industries require different methods of management, courts also have considered the custom of management in the particular industry.⁵⁸

C. Characteristics of the Director

The courts have considered whether a director possesses extraordinary skill, knowledge, or experience in determining when a director is entitled to rely.⁵⁹ Although appearing to reward ignorance and punish skill, the fiduciary duty requires directors to use their abilities for the

⁵⁴ *Briggs*, 141 U.S. at 159 (officer as owner of two-thirds of stock had personal interest in proper management); *Harmon v. Willbern*, 520 F.2d 1333, 1335 (10th Cir. 1975)(officers had financial interest in corporation's performance).

⁵⁵ *Warner v. Penoyer*, 91 F. 587, 591 (2d Cir. 1898)(amount of surveillance of management varies with size and location of bank); *Graham*, 188 A.2d at 130 (duties of directors varies with size of company); MODEL BUS. CORP. ACT. § 8.30 comment at 222 (duties vary depending on size and location of corporation); cf. *Kelly v. Bell*, 254 A.2d 62, 72 (Del. Ch. 1969)(magnitude of questions determines director's duties).

⁵⁶ *Graham*, 188 A.2d at 130.

⁵⁷ *Briggs*, 141 U.S. at 162-63 (directors unable to inform themselves so must rely on others); cf. MODEL BUS. CORP. ACT. § 8.30 comment at 222 (circumstances of corporation determine director's duties).

⁵⁸ See, e.g., *Warner v. Penoyer*, 91 F. 587, 591 (2d Cir. 1898)(supervision in large city banks was not custom in small county banks). See *F.D.I.C. v. Boone*, 361 F. Supp. 133, 165 (W.D. Okla. 1972)(banking industry requires reliance on officer's honesty); *Trembert v. Mott*, 271 Mich. 683, 261 N.W. 109, 114 (1935)(customary to entrust routine business to officers).

⁵⁹ See, e.g., *Panter v. Marshall Field & Co.*, 646 F.2d 271, 297 (7th Cir. 1981)(director who was antitrust lawyer could evaluate soundness of advice given to him); *Warner v. Penoyer*, 91 F. 587, 588 (2d Cir. 1898)(directors were inexperienced in banking); *Van Gorkom*, 488 A.2d at 894-95 (McNeilly, J., dissenting)(arguing that directors' experience indicated likelihood of informed decision); *Martin v. Hardy*, 251 Mich. 413, 232 N.W. 197, 198 (1930)(directors were experienced businessmen but not experienced in particular business).

corporation's benefit.⁶⁰ When making informed judgments, the inexperienced may not be held to the same standard as the experienced; however, the inexperienced must still exercise the common sense a reasonable person would exercise.⁶¹

D. Characteristics of the Transaction

Since directors have a duty to protect both the corporation's interests and, derivatively, the stockholders' interests,⁶² the directors' right to rely and duty to investigate should depend in part on the danger a particular transaction poses to those interests.⁶³ Thus, large transactions should require more of the directors' attention than small transactions.⁶⁴ The directors' right to rely should also depend in part on whether the transaction involves routine or unusual affairs,⁶⁵ allowing more reliance in routine matters than in infrequent ones. The complexity of the transaction is another factor to consider.⁶⁶ As the transaction becomes more complex, the directors' right to rely increases.⁶⁷ The

⁶⁰ See MODEL BUS. CORP. ACT § 8.30 comment at 222 (director's duties vary according to qualifications and skill).

⁶¹ See, e.g., *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814, 821-22 (1981)(directors must meet minimum standard of competence); *Campbell v. Watson*, 62 N.J. Eq. 396, 50 A. 120, 139 (1901)(reasonable skill required to meet standard of care). See *Seder v. Gibbs*, 333 Mass. 445, 131 N.E.2d 376, 380 (1956)(directors must possess reasonable intelligence); cf. *Dinsmore v. Jacobson*, 242 Mich. 192, 218 N.W. 700, 701 (1928)(inexperience would not excuse foolish actions).

⁶² See *Van Gorkom*, 488 A.2d at 872 (fiduciary duty of director requires he protect interests of corporation and stockholders).

⁶³ See *Briggs*, 141 U.S. at 147 (director's duty of care varies with undertaking); *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36, 44 (1979)(court observed transaction's importance to policyholders); CAL. CORP. CODE § 309 comments (West Supp. 1986)(duty of care varies with size of activity); MODEL BUS. CORP. ACT. § 8.30 comment at 222 (1984)(same).

⁶⁴ Compare *Van Gorkom*, 488 A.2d at 874-78 (court's close scrutiny of directors' actions in merger approval) with *Graham*, 188 A.2d at 130 (court showed great deference to directors in context of ordinary, daily operations).

⁶⁵ See, e.g., *Warner v. Penoyer*, 91 F. 587, 590 (2d Cir. 1898)(directors may commit daily affairs to officers); *Harmon v. Willbern*, 374 F. Supp. 1149, 1164 (D. Kan. 1974)(great deference shown to directors in relying on officers to conduct daily affairs), *aff'd*, 520 F.2d 1333 (10th Cir. 1975); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N.E. 42, 45 (1930)(directors may rely on officers to conduct daily business). Indeed, the historic justification for the right of reliance was the need to facilitate daily, routine affairs. See CAL. CORP. CODE § 309 comment at 28 (West Supp. 1986)(normal business requires reliance)(quoting Lord Halsbury).

⁶⁶ MODEL BUS. CORP. ACT § 8.30 comment at 222 (1984).

⁶⁷ See *Hawes & Sherrard, Model Act Section 35—New Vigor for the Defense of Reliance on Counsel*, 32 BUS. LAW. 119, 129 (1976)(reliance justified where transaction

courts also consider both time constraints imposed by the transaction⁶⁸ and the time taken by the director in becoming informed and making a decision.⁶⁹ When courts consider the time involved, they should realize that as directors become more experienced, they need less time to become informed and make decisions.⁷⁰

E. The Nature of the Advice Given

When deciding whether reliance was justified, courts have also considered whether the advice was unreasonable or inadequate on its face.⁷¹ As the advice becomes more complex, greater deference should be shown to directors who relied thereon.⁷² While normally advice need not be in any certain form,⁷³ courts have considered whether the director acted with a lack of documentation to support the information provided.⁷⁴ Additionally, some statutes require certain kinds of advice to

and advice are complex); *cf.* *Buffalo Forge Co. v. Ogden Corp.*, 555 F. Supp. 892, 904-05 (W.D.N.Y. 1953)(great amount of reliance on merger specialists was reasonable); *Pool v. Pool*, 22 So. 2d 131, 133 (La. Ct. App. 1945)(director's reliance on accountant and attorneys in declaring dividends to avoid surtax); *Gilbert v. Burnside*, 13 A.D.2d 982, 216 N.Y.S.2d 430, 432 (App. Div. 1961)(reliance on counsel to properly structure reorganization), *aff'd*, 11 N.Y.2d 960, 183 N.E.2d 325, 229 N.Y.S.2d 10 (1962).

⁶⁸ See *Van Gorkom*, 488 A.2d at 875 (court considered time constraints in holding reliance unreasonable); MODEL BUS. CORP. ACT § 8.30 comment at 222 (1984)(directors' duties vary with "urgency" of the transaction).

⁶⁹ See *Whittaker Corp. v. Edgar*, 535 F. Supp. 933, 941 (N.D. Ill. 1982)(extensive discussion of options before making decision); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 938-39 (Del. 1985)(extensive investigation by management and discussion by directors before approving merger); *Van Gorkom*, 488 A.2d at 874 (court noted, absent emergency, two hours of deliberation before approving merger was negligent).

⁷⁰ *Van Gorkom*, 488 A.2d at 894-95 (McNeilly, J., dissenting)(highly qualified and informed directors should be able to make fast decisions on sale of corporation).

⁷¹ See, e.g., *FSLIC v. Geisen*, 392 F.2d 900, 904 (7th Cir. 1968)(advice directly contradicted by statute); *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 54 A. 209, 212 (1903)(statute expressly contradicted advice); *Van Gorkom*, 488 A.2d at 875 (report was irrelevant on its face); *Harris v. Pearsall*, 116 Misc. 366, 190 N.Y.S. 61, 70-71 (1921)(denied defense of reliance on advice that was clearly unreasonable).

⁷² See, e.g., *Pool v. Pool*, 22 So. 2d 131, 133 (La. Ct. App. 1945)(reliance on complicated advice); *cf.* *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950)(corporation's reliance on tax advice); *Nanfito v. Tekseed Hybrid Co.*, 341 F. Supp. 240, 244 (D. Neb. 1972)(reliance on advice about stock exchange ratio in merger).

⁷³ See *Graham*, 188 A.2d at 130 (allowed reliance on corporate records); *Kors v. Carey*, 39 Del. Ch. 47, 158 A.2d 136, 141 (1960)(oral discussion with experts); *Hawes & Sherrard*, *supra* note 67, at 143 (§ 35 does not require any degree of formality).

⁷⁴ See *Van Gorkom*, 488 A.2d at 874-75 (representation of chief executive officer was not supported by merger documents); *cf.* *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 939

be in writing.⁷⁵

IV. CONCLUSION

The tension between directors' right to rely and their duty to become informed is apparent when directors have a duty to investigate beyond a subordinate's report, even though the directors do not have knowledge making reliance unwarranted.⁷⁶ The policy underlying a broad right of reliance is that of promoting business,⁷⁷ and the general consensus is that requiring directors to take an adversarial position against management by investigating management's advice would not improve corporate performance.⁷⁸ In deciding whether directors' reliance is reasonable, courts should consider primarily the transaction under consideration.⁷⁹ When directors face decisions about routine matters, they should be able to rely on subordinates without any substantial independent investigation or inquiry, absent notice of wrongdoing.⁸⁰ However, the policy of promoting the daily affairs of business is not greatly enhanced by allowing such reliance in infrequent, specialized transactions.⁸¹ In such transactions, the interests of the corporation and the stockholders outweigh the policy of facilitating business. Therefore, in such a transaction, directors should take more of an adversarial position to management and critically view the information provided by the subordinates.⁸² In those specialized situations directors

(Del. 1985)(thorough documentation presented to directors).

⁷⁵ See, e.g., N.Y. BUS. CORP. LAW § 717 (McKinney 1963)(amended 1977)(required report by accountant to be in writing); TEX. BUS. CORP. ACT ANN. art. 2.41(D)(Vernon 1980)(requiring attorney's opinion to be in writing); WASH. REV. CODE ANN. § 23A.08.450 (1969)(amended 1985)(required accountant's report be written).

⁷⁶ See CAL. CORP. CODE § 309 comment at 28 (West Supp. 1986)(trust is necessary for business).

⁷⁷ *Id.*

⁷⁸ See *Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639, 653 (Iowa 1979)(directors not required to take adversarial position against management absent suspicion of wrongdoing); see also *Corporate Director's Guidebook*, *supra* note 2, at 1621 (director is not to be adversary to management).

⁷⁹ The Delaware Supreme Court has reached this result in its case law. *Van Gorkom* may be reconciled with the general common-law rule of *Graham* and *Briggs* because the common-law rule applies in routine affairs, *Graham*, 188 A.2d at 128, 130, not in extraordinary affairs such as a merger, *Van Gorkom*, 488 A.2d at 872, 875, 877, 881.

⁸⁰ See *Graham*, 188 A.2d at 130 (great leniency shown in allowing directors to rely in daily affairs). See generally *Cary & Harris, Standards of Conduct Under Common Law, Present Day Statutes and the Model Act*, 27 BUS. LAW. 61, 72 (1972)(reliance is necessary in routine affairs).

⁸¹ See *supra* notes 64-65 and accompanying text.

⁸² See *Van Gorkom*, 488 A.2d at 872 (fiduciary duty requires critical assessment of

should not only inquire into the subordinates' basis of knowledge, but also seek outside advice on the transaction.⁸³

In the *Van Gorkom* case, the court imposed a duty of investigation although prior law did not indicate such a duty was required.⁸⁴ To ensure directors know of this duty of investigation, section 8.30 of the Model Business Corporations Act should expressly provide for differing duties of investigation depending on the transaction. This provision would also ensure that judges impose such a duty instead of leaving to the judge's discretion whether a duty of investigation exists under each set of factual circumstances.

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information in merger decision); *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36, 44 (1979)(reliance on officers not reasonable in merger); see also *Corporate Director's Guidebook*, *supra* note 2, at 1608 (special circumstances may require critical view of information).

⁸³ See *Van Gorkom*, 488 A.2d at 875, 877-78 (directors needed to inquire into basis of knowledge of officers and of independent investment banker); cf. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 939 (Del. 1985)(directors received outside advice in approving merger); *Kaplan v. Goldsamt*, 380 A.2d 556, 568 (Del. 1977)(directors received outside advice before passing on purchase of stock).

⁸⁴ See *supra* note 48.

CONSTITUTIONAL ALTERNATIVE FOR LIBEL RECOVERY: A MATTER NOT OF PUBLIC CONCERN

On June 26, 1985 the United States Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹ recognized a "subject matter" requirement in libel actions necessary to trigger constitutional protections of the magnitude provided by *Gertz v. Robert Welch, Inc.*² False speech defaming the private individual must implicate a "matter of public concern"³ to bar recovery of presumed and punitive damages absent proof of actual malice. Otherwise, if the speech is found by the court to be a matter of private concern, the defamed private plaintiff may recover both presumed and punitive damages absent a showing of actual malice,⁴ arguably contrary to *Gertz*.⁵

This comment will first analyze by elemental factors the significant constitutional decisions in the area of libel law beginning with *New York Times Co. v. Sullivan*⁶ in 1964 and then compare the views of three of the Justices on the Supreme Court to ascertain any shifts in

¹ 105 S. Ct. 2939 (1985). Defendant-Petitioner Dun & Bradstreet, a credit reporting agency, sent a confidential credit report to five subscribers indicating that Plaintiff-Respondent Greenmoss Builders, Inc., a construction contractor, had filed a voluntary petition for bankruptcy. The report grossly misrepresented Greenmoss Builders' financial condition. The report, admitted by Dun & Bradstreet to be false, had been prepared based on information supplied by an employee which had not been verified before publication. Dun & Bradstreet, upon Greenmoss Builders' request, sent a corrective notice to the five subscribers but refused to release the names of the subscribers to Greenmoss Builders. Greenmoss Builders was dissatisfied with the notice and filed suit in Vermont state court. The jury awarded \$50,000 in compensatory or presumed damages and \$300,000 in punitive damages to Greenmoss Builders. Upon motion, the trial court granted Dun & Bradstreet's request for a new trial on the ground of dissatisfaction with its jury charge concerning recovery of presumed and punitive damages from a nonmedia defendant, being uncertain whether *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), applied to the case. The Vermont Supreme Court reversed the trial court's grant of a new trial, holding that a credit reporting agency was not the type of media worthy of first amendment protection under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and that media protections outlined in *Gertz* were inapplicable to nonmedia defamation actions. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414 (Vt. 1983). On grant of certiorari, the United States Supreme Court affirmed, but on different grounds from the Vermont Supreme Court.

² 418 U.S. 323 (1974).

³ *Greenmoss Builders*, 105 S. Ct. at 2946.

⁴ *Id.*

⁵ *Id.* at 2944, 2959.

⁶ 376 U.S. 254 (1964); see *infra* notes 14-38 and accompanying text.

position.⁷ The second and third sections will examine the state interest and the constitutional interest being protected which, if applicable, limits the traditional state interest.⁸ The third section will specifically focus on recent Supreme Court usage of the phrase "matters of public concern."⁹ In section four the question raised in *Greenmoss Builders*, whether the plurality opinion is a return to the common law of libel, will be addressed, and present criteria for recovery of damages by a libel plaintiff will be examined.¹⁰ The final section will consider the policy arguments raised by the presently divided Court and the implications of those conflicting views.¹¹

The Supreme Court decisions in the area of libel law presently provide clear guidance when a high public official or a recognized public figure alleges defamation concerning an undisputed public issue. Beyond the easily defined plaintiff and issue where the "actual malice" protections apply, it is less clear. Lower court decisions turn on each individual court's definition of whether the defamed plaintiff is a public or private individual and now, following *Greenmoss Builders*, they will also turn on whether the alleged defamatory statement is a matter of public or private concern. Depending on where the offending defendant steps across the line from the less protected state interest area into the highly protected constitutional area, it seems that state courts could find the extent of plaintiff's recovery controlled solely by a determination of whether the false statement constitutes a matter of public or private concern. Following *Greenmoss Builders*, the test for determination of this subject-matter requirement appears to be an evaluation of the expression's content and form in relation to the context in which it was published. This evaluation of necessity requires a case by case analysis. If the expression is determined to concern a purely private matter, the plaintiff may recover both presumed and punitive damages without proof that the defendant acted with actual malice, arguably contrary to what is required by *Gertz*. Additionally, the question remains: is there a category of speech concerning purely private

⁷ See *infra* notes 39-50 and accompanying text.

⁸ See *infra* notes 51-81 and accompanying text.

⁹ See *infra* notes 82-131 and accompanying text.

¹⁰ See *infra* notes 132-147 and accompanying text.

¹¹ See *infra* notes 148-164 and accompanying text. This comment will not examine the myriad of other areas which create problems for the courts in this area of law, such as determination of what is "defamatory", "false"; burden of proof of falsity; distinction between "fact" and "opinion"; determination of the status of the plaintiff as public official, all-purpose public figure, limited-purpose public figure, involuntary public figure, or private individual.

matters about private individuals which falls totally outside the realm of constitutional protection which may be regulated exclusively by state libel law? Where is the bright line between state interest and constitutional interest?

I. THE EVOLUTION OF CONSTITUTIONAL LIBEL LAW

Twelve Supreme Court opinions beginning in 1964 reflect the constitutional requirements and their evolving interpretation as imposed in the area of state libel law.¹² The decisions are presented by focusing on the factors for evaluating whether the speech is a matter of public or private concern as applied in *Greenmoss Builders* and derived from *Connick v. Myers*,¹³ — the content and form of the defamatory speech viewed in light of the factual context in which it was published.

These decisions are set out below in brief form:

New York Times Co. v. Sullivan (1964)¹⁴

Plaintiff: elected city commissioner

Defendant: newspaper publisher

Form of publication: full-page advertisement carried in New York Times concerning civil rights activities by Negro students in Montgomery, Alabama

Content: verbal illustrations of the "wave of terror" being conducted by those opposed to the granting of certain civil rights to Negroes

Context: civil rights activities in Alabama led by Martin Luther King, Jr. in the 1960's

Holding: A public official may not recover damages for defamation relating to his official conduct unless he proves the statement was made with "actual malice": with knowledge

¹² See generally Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria — A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFFALO LAW REVIEW 579, 581-622 (1984) (chronological overview of significant Supreme Court decisions in libel law).

¹³ *Greenmoss Builders*, 105 S. Ct. at 2947, and n.8. The factors to be evaluated in determining whether the disputed expression addresses a matter of public concern are the speech's content, form and context as evaluated in light of the whole record. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

¹⁴ 376 U.S. 254, 256-57 (1964). A jury verdict of \$500,000 for presumed damages was returned. The Supreme Court reversed the Alabama Supreme Court and remanded for a new trial. Justice White joined the majority opinion by Justice Brennan without qualification. A concurring opinion was written by Justice Black and joined by Justice Douglas. An opinion concurring only in the result was written by Justice Goldberg and joined by Justice Douglas.

that it was false or with reckless disregard of whether it was false or not.¹⁵

Majority opinion: Justice Brennan

Fault basis necessary for recovery: actual malice

Garrison v. Louisiana (1964)¹⁶

Plaintiffs: eight state court judges of the State of Louisiana

Defendant: district attorney of parish

Form of publication: statement by district attorney issued at press conference

Content: disparaging remarks by the district attorney concerning judicial inefficiency, laziness, excessive vacations and suspect motives in refusing to authorize disbursements for undercover investigations of vice

Context: Dispute over legality of use of certain funds to pay undercover agents to conduct investigations of commercial vice in the Bourbon and Canal Street districts of New Orleans

Holding: The fact that a public official's private reputation, as well as his public reputation, is harmed does not make the *New York Times* rule inapplicable; mere negligence does not defeat the *New York Times* privilege, but rather reckless disregard for the truth is required.¹⁷

Majority opinion: Justice Brennan

Fault basis required for recovery: actual malice

Rosenblatt v. Baer (1966)¹⁸

Plaintiff: former county supervisor employed by three elected county commissioners

Defendant: regular unpaid contributor to newspaper

¹⁵ *Id.* at 279-80.

¹⁶ 379 U.S. 64, 66 (1964). The defendant district attorney was convicted of criminal defamation by the state court which was affirmed by the Louisiana Supreme Court. The United States Supreme Court reversed. There were three separate concurring opinions. Justice Black's opinion was joined by Justice Douglas; Justice Douglas' opinion was joined by Justice Black; and Justice Goldberg wrote alone.

¹⁷ *Id.* at 77-79.

¹⁸ 383 U.S. 75, 77-78, 87, 94 (1966). The jury awarded damages of \$31,500 to the plaintiff. The Supreme Court reversed the New Hampshire Supreme Court decision and remanded for a new trial. Justice Clark concurred in the result only. Two separate concurring opinions by Justice Douglas and Justice Stewart were written. An opinion by Justice Black concurring in part and dissenting in part was joined by Justice Douglas. Justice Harlan wrote an opinion concurring in part and dissenting in part. A dissenting opinion was written by Justice Fortas.

publication

Form of publication: one column in local evening newspaper

Content: alleged imputation of previous embezzlement and mismanagement of recreational area

Context: underdeveloped winter ski recreational area had been subject of public controversy for several years; subject of state legislative action

Holding: The designation of "public official" applies at least to those government employees who hold positions of such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it; *New York Times* rule applies.¹⁹

Majority opinion: Justice Brennan

Fault basis necessary for recovery: actual malice

Curtis Publishing Co. v. Butts and *Associated Press v. Walker* (1967)²⁰

Butts:

Plaintiff: individual employed by a private corporation as athletic director for state university

Defendant: magazine publisher

Form of publication: article published in Saturday Evening Post

Content: accused plaintiff of conspiring to "fix" a college football game

Context: 1962 football season; game between University of Georgia and University of Alabama

Walker:

Plaintiff: former career U.S. Army officer; now a private citizen

Defendant: Associated Press

¹⁹ *Id.* at 85-86.

²⁰ 388 U.S. 130, 135, 138, 140, 142 (1967). In *Butts*, the jury awarded the plaintiff athletic director \$60,000 in general damages and \$3,000,000 in punitive damages. The trial court reduced the award by remittitur to a total of \$460,000. The Supreme Court affirmed the Fifth Circuit Court of Appeals. In *Walker*, a jury verdict of \$500,000 compensatory and \$300,000 punitive damages was handed down. The Supreme Court reversed the Texas Supreme Court and remanded. The plurality opinion was joined by Justices Clark, Stewart and Fortas. The concurring opinion of Chief Justice Warren, adopting the actual malice test for "public figures", was joined by Justices Black, Douglas, Brennan and White. Two separate opinions concurring in the result of *Walker* and dissenting in *Butts* were written, the first by Justice Black, joined by Justice Douglas and the second by Justice Brennan, joined by Justice White.

Form of publication: news dispatch via AP service

Content: eyewitness account of riot on University of Mississippi campus in connection with enrollment of Negro James Meredith in which plaintiff allegedly took command of the crowd and personally led a charge against federal marshalls

Context: federal intervention to enforce a federal court decree ordering the enrollment of a Negro as a student at the University of Mississippi

Limited Holding: A "public figure" who thrusts himself into the vortex of a controversy or is involved in activities of great interest to the public must prove *New York Times* malice in order to recover damages for defamation.²¹

Concurring opinion: Chief Justice Warren

Fault basis necessary for recovery: actual malice

St. Amant v. Thompson (1968)²²

Plaintiff: deputy sheriff of parish

Defendant: candidate for public office

Form of publication: televised speech in Baton Rouge, Louisiana

Content: political candidate read a series of questions to a member of the local Teamsters Union concerning the activities of the president of the local; union member's answers included imputations of gross misconduct by the deputy sheriff in his relations with the union president

Context: 1962 political campaign for U.S. Senator from Louisiana

Holding: The reckless disregard aspect of the "actual malice" test requires that the defendant in fact entertain serious doubts concerning the truth of his publication.²³

Majority opinion: Justice White

Fault basis necessary for recovery: actual malice

Rosenbloom v. Metromedia (1971)²⁴

Plaintiff: private individual; distributor of nudist magazines

²¹ *Id.* at 163-64, 170, 172.

²² 390 U.S. 727, 728-29 (1968). The trial judge awarded the plaintiff \$5,000. The Supreme Court reversed the Louisiana Supreme Court and remanded. Justices Black and Douglas concurred in the judgment. Justice Fortas dissented.

²³ *Id.* at 731.

²⁴ 403 U.S. 29, 32, 34-35 (1971). The trial resulted in a jury award of \$25,000 in general and \$725,000 in punitive damages, which was reduced on remittitur to \$250,000.

Defendant: radio station

Form of publication: numerous short radio news broadcasts covering police seizure of "allegedly obscene books", plaintiff's arrest, and his subsequent lawsuit against city officials

Content: references to "smut merchants", "smut literature racket" and "girlie-book peddlers" and naming of plaintiff

Context: 1963 response to citizen complaints to enforce Philadelphia's obscenity laws

Holding: The *New York Times* "actual malice" rule applies to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.²⁵

Plurality opinion: Justice Brennan

Fault basis necessary for recovery: actual malice

Gertz v. Robert Welch, Inc. (1974)²⁶

Plaintiff: private individual; practicing attorney

Defendant: magazine publisher

Form of publication: article published in monthly magazine, *American Opinion*, with national distribution and expressing views of John Birch Society

Content: attorney portrayed as Communist, a criminal and as "architect of the frame-up" of a local police officer convicted of murdering a youth, whose family the attorney represented in civil litigation

Context: John Birch Society in early 1960's began to warn of a nationwide conspiracy to discredit local law enforcement agencies so that a national pro-Communist police force could be created

Holding: The states may define for themselves the standard of

The Court of Appeals for the Third Circuit reversed and rendered. The Supreme Court affirmed the reversal by the court of appeals, resulting in no recovery for the plaintiff. Justice Brennan's plurality opinion was joined by Chief Justice Burger and Justice Blackmun. Two Justices concurred in the judgment only, Justice Black and Justice White. Justice Harlan and Justice Marshall wrote separate dissenting opinions.

²⁵ *Id.* at 43-44.

²⁶ 418 U.S. 323, 325, 329 (1974). Attorney Gertz was awarded \$50,000 in damages by the jury. The trial court entered judgment n.o.v. for the defendant. The Supreme Court reversed the Seventh Circuit Court of Appeals and remanded for new trial. Justice Powell's majority opinion was joined by Justices Stewart, Marshall, Blackmun, and Rehnquist. Separate dissenting opinions were written by Chief Justice Burger and Justices Douglas, Brennan, and White.

liability for a defendant who publishes a defamatory falsehood which injures a private individual so long as they do not impose liability without fault; states may not permit recovery of presumed or punitive damages without a showing of "actual malice."²⁷

Majority opinion: Justice Powell

Fault basis necessary for recovery: at least some fault

Time, Inc. v. Firestone (1976)²⁸

Plaintiff: private individual; wife of heir of wealthy industrialist

Defendant: weekly news magazine

Form of publication: single short item in "Milestones" section of *Time*

Content: inaccurate statement that divorce was granted on grounds of both extreme cruelty and adultery

Context: domestic relations litigation involving lengthy trial which received significant local media attention

Holding: Plaintiff was not a public figure; *Gertz* provides adequate safeguards for the press by requiring some type of fault.²⁹

Majority opinion: Justice Rehnquist

Fault basis necessary for recovery: at least some fault

First National Bank of Boston v. Bellotti (1978)³⁰

Plaintiffs: two national banking associations and three business corporations

Defendant: State of Massachusetts

Nature of action: constitutional challenge of state statute forbidding expenditure by a corporation of funds to influence public votes on questions not necessarily affecting the

²⁷ *Id.* at 347, 349.

²⁸ 424 U.S. 448, 452 (1976). Mrs. Firestone received a jury verdict for \$100,000 in damages. The Supreme Court vacated the judgment of the Supreme Court of Florida and remanded for a new trial to determine the fault element. The majority opinion by Justice Rehnquist was joined by Chief Justice Burger, and Justices Stewart, Blackmun and Powell. Justices Brennan, White and Marshall wrote separate dissenting opinions.

²⁹ *Id.* at 455, 457.

³⁰ 435 U.S. 765, 770-71 (1978). The trial court upheld a Massachusetts statute as constitutional. The Supreme Court held that the statute violated the first amendment and was, therefore, unconstitutional. Justice Powell's majority opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun and Stevens. Justice White wrote a dissenting opinion joined by Brennan and Marshall. Justice Rehnquist also wrote a separate dissenting opinion.

property or assets of the corporation
Context: corporations sought to publicize their opposition to a referendum to authorize enactment of a graduated personal income tax
Holding: speech by a corporation, an association, a union, or other entity to influence public issues is entitled to the same first amendment protections as an individual; the identity of the source of the speech is immaterial.³¹
Majority opinion: Justice Powell

Hutchinson v. Proximire (1979)³²

Plaintiff: private individual; behavioral scientist whose research had received federal funding
Defendants: U.S. Senator and his legislative assistant
Form of publication: advance press release and speech concerning "Golden Fleece Award" which was distributed nationwide and abroad; later references in a newsletter and on TV interview
Content: reference to research as "monkey business", of "transparent worthlessness" and characterized as having "made a monkey out of the American taxpayer"
Context: U.S. Senator publicized egregious examples of wasteful government spending each month
Holding: Plaintiff was not a public figure; there is no grant of immunity to a member of Congress for defamatory statements; and a defendant cannot create the "public figure" defense by his own conduct of publicizing items about the private individual.³³
Majority opinion: Chief Justice Burger
Fault basis necessary for recovery: at least some fault [not discussed]

Wolston v. Reader's Digest Association, Inc. (1979)³⁴

Plaintiff: private individual; nephew of a couple, the Sobles,

³¹ *Id.* at 784, 777.

³² 443 U.S. 111, 114-17 (1979). The trial court granted the defendant's motion for summary judgment. The Supreme Court reversed the Seventh Circuit Court of Appeals and remanded for trial on the merits. The majority opinion by Chief Justice Burger was joined by Justices White, Marshall, Blackmun, Powell, Rehnquist and Stevens. Justice Stewart wrote an opinion concurring in part and dissenting in part. Justice Brennan wrote a dissenting opinion.

³³ *Id.* at 132, 135-36.

³⁴ 443 U.S. 157, 159-60 (1979). The trial court granted the defendant's motion for

who pleaded guilty in 1958 to espionage for the Soviet Union

Defendants: author; book and magazine publisher

Form of publication: book entitled *KGB, the Secret Work of Soviet Agents*, published in 1974

Content: index and text contained inaccurate references to plaintiff's having been indicted for espionage as a Soviet agent

Context: publication of book sixteen years after plaintiff's failure to appear before the grand jury investigating Soviet espionage in 1958

Holding: Plaintiff was not a voluntary public figure; a private person who engages in criminal conduct does not automatically become a limited-purpose public figure.³⁵

Majority opinion: Justice Rehnquist

Fault basis necessary for recovery: at least some fault

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985)³⁶

Plaintiff: corporation; building contractor

Defendant: credit reporting agency

Form of publication: confidential credit report sent to five subscribers

Content: erroneous report indicated plaintiff had filed a voluntary petition for bankruptcy and grossly misrepresented assets and liabilities

Context: credit report mailed to subscribers, who were potential or existing creditors of plaintiff, in regular course of subscription service³⁷

summary judgment which was affirmed by the District of Columbia Court of Appeals and reversed by the Supreme Court. Justice Rehnquist's majority opinion was joined by Chief Justice Burger and Justices Stewart, White, Powell and Stevens. Concurring in the result only was Justice Blackmun, joined by Justice Marshall. Justice Brennan wrote a separate dissenting opinion.

³⁵ *Id.* at 168-69.

³⁶ *Greenmoss Builders*, 105 S. Ct. at 2941-42. The jury awarded \$50,000 in compensatory or presumed damages and \$300,000 in punitive damages. The Vermont Supreme Court affirmed the award, reversing the trial court's grant of a new trial. The Supreme Court affirmed on different grounds. Recovery of both presumed and punitive damages absent a showing of actual malice was allowed the private plaintiff on these facts. The plurality opinion by Justice Powell was joined by Justice Rehnquist and Justice O'Connor. Concurring in the result with separate opinions were Justice White and Chief Justice Burger. Justice Brennan wrote a dissenting opinion, joined by Justices Marshall, Blackmun and Stevens.

³⁷ *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 416 (Vt. 1983).

Holding: Because the speech involved no matters of public concern, the state interest adequately supports awards of presumed and punitive damages without a showing of "actual malice."³⁸

Plurality opinion: Justice Powell

Fault basis necessary for recovery: at least some fault [not discussed]

The twelve opinions reflect the Supreme Court's focus on the status of the defamed plaintiff, with a brief three-year hiatus following the *Rosenbloom* decision when the focus was on the subject matter of the defamatory speech. The decisions are interpretations and refinements of the constitutional requirements set out in *New York Times* and *Gertz*.

In attempting to trace the evolution of constitutional safeguards protecting the uninhibited speech of individuals and freedom of the press in the area of defamation law, the individual views of three members of the Supreme Court are instructive. Justice Brennan was appointed to the Supreme Court in 1956. Justice White was appointed in 1962, and Justice Powell received his appointment in 1972. Justice Brennan and Justice White are the only two members of the present Court who have participated in all decisions in this area of constitutional law.³⁹ Ironically, these two Justices also represent the opposing poles of thought on the Court.⁴⁰ Justice Brennan has consistently

³⁸ *Greenmoss Builders*, 105 S. Ct. at 2946, 2947.

³⁹ See *supra* notes 14, 36 and accompanying text.

⁴⁰ *Greenmoss Builders*, 105 S. Ct. at 2954, 2959-60. Justice Brennan has continuously expressed his belief that the fault or negligence standard established by the Court in *Gertz* is inadequate to protect first amendment freedoms of speech and press. See *Rosenbloom*, 403 U.S. at 52 (negligence standard gives insufficient breathing space). Justice Brennan in *Greenmoss Builders* argued that credit reporting required at least the constitutional protections of *Gertz* whether viewed as a matter of public or private concern. *Greenmoss Builders*, 105 S. Ct. at 2960. The *Gertz* protections, while permitting the states significant leeway to compensate for actual damage to reputation, require that in order for the defamed private plaintiff to recover, he must (1) show fault, at least negligence, in the defendant's determination of the truth or falsity of the defamatory statement in order to recover actual damages; and (2) show actual malice in the publication in order to recover presumed or punitive damages. *Id.* at 2957. Justice Brennan found the subject matter of this speech implicated matters of public concern. *Id.* at 2962. Justice White, in contrast, agreed with the distinction drawn by Justice Powell, that the magazine article about attorney Gertz involved a matter of public concern while the defamatory credit report about Greenmoss Builders did not involve any matter of general or public importance. *Id.* at 2953. Justice White expressed the rationale for his position which was that both Gertz and Greenmoss Builders were "private individuals"; their reputational interests were exclusively a matter of state interest; and he thus believed

voiced the need for broad constitutional protections, severely restricting state libel laws, because he foresees that resulting lawsuits and unpredictable damage awards will chill needed debate on public issues. His view focuses on the spectre of self-censorship by both media and individuals which is an impermissible prior restraint on first amendment speech.⁴¹ Justice White's view, which today is at the opposite end of the continuum, focuses on the value of the private individual's reputation and good name which have traditionally been shielded by state common law. He is troubled by the fact that under both *Gertz* and *New York Times*, falsehoods published without the requisite degree of fault on the part of the defendant remain uncorrected and the wrong done to the defamed plaintiff must go unvindicated, thus corrupting first amendment speech. Justice White's position, initially in accord with Justice Brennan's, has not remained static since 1964, but has shifted in its emphasis toward the state interest.⁴²

Gertz was erroneously decided by the Court and should be overruled. *Id.* at 2950-51.

⁴¹ *New York Times*, 376 U.S. at 270, 279. Justice Brennan spoke for a unanimous Court in both *New York Times* and *Garrison*. Divergent views appeared in *Rosenblatt* (1966) and multiplied in response to the attempted extension of the *New York Times* rule to any individual when the speech concerned a public matter. See *Rosenbloom*, 403 U.S. at 57-62 (White, J., concurring in the judgment)(views of various members of Court compared). See *supra* notes 18, 24 and accompanying text. Since *Rosenbloom*, Justice Brennan has dissented in the libel decisions reviewed in this comment, indicative of the position of the majority on the Court. His broad view of needed constitutional protection necessarily required that any state regulation be narrowly tailored to implement a legitimate state interest. He stated that Justice Powell's analysis in *Greenmoss Builders* failed to require narrowly tailored regulation. "The point, of course, is not that false speech intrinsically deserves protection [cite omitted], but that the burdening of unintentional false speech potentially chills truthful speech." *Greenmoss Builders*, 105 S. Ct. at 2964, n.17.

⁴² *Greenmoss Builders*, 105 S. Ct. at 2950. Justice White joined with Justice Brennan in the defamation opinions until *Rosenbloom*, in which he concurred in the judgment only. See *supra* note 24 and accompanying text. He expressed that the separate *Rosenbloom* opinions "decide[d] broader constitutional issues and displace[d] more state libel law" than was necessary. *Rosenbloom*, 403 U.S. at 59. Recognizing that he stood alone in his views in 1971, he stated he was not convinced that the Court must extend the *New York Times* rule and thus "shift the burden from those who publish to those who are injured." *Id.* at 60. He asserted in his dissent in *Gertz* that common-law remedies should be retained for private plaintiffs, which would allow the private plaintiff to prove the statement to be false and obtain a judgment of falsehood without having to establish any degree of fault. *Gertz*, 418 U.S. at 391-92; *Greenmoss Builders*, 105 S. Ct. at 2952, n.3; see also *Gertz*, 418 U.S. at 347, n.10 (Justice Powell's view of Justice White's dissent). In his concurring opinion in *Greenmoss Builders*, Justice White remained convinced that *Gertz* was erroneously decided and further that *New York Times* disserved the values of the first amendment by "countenanc[ing] two evils: first, the stream of information about public officials and public affairs is polluted and often re-

Significantly, Justice Powell authored the five-four majority opinion in *Gertz* (1974) and the three-two-four plurality opinion in *Greenmoss Builders* (1985), the two landmark decisions in this area since 1967.⁴³ In *Gertz*, Justice Powell and four other members of the Court, relying on a balancing of competing interests approach, repudiated Justice Brennan's extension of the *New York Times* constitutional protections to "all discussion and communications involving matters of public or general concern," which had been advanced in the 1971 *Rosenbloom* plurality opinion.⁴⁴ *Gertz* represented the beginning of the return pendulum swing. Justice Powell recognized that there was a valid state interest to be balanced against the required constitutional protections. *Greenmoss Builders* represents perhaps the counterpoint which will create a balance in the pendulum swing. The decision by Justice Powell, who was joined by two other Justices, is a recognition of an even stronger valid state interest in protecting the private individual's reputation, conditioned on a finding that the speech did not involve a matter of public concern.⁴⁵ Justice Powell did not find his 1985 opinion in *Greenmoss Builders* to be inconsistent with *Gertz*,

mains polluted by false information; and second, the reputation and personal life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts." *Greenmoss Builders*, 105 S. Ct. at 2951. While strongly endorsing the first amendment considerations which prompted the Court to ensure "a margin of error" and "some breathing room" for those who write and speak about public affairs, Justice White stated the Court had "engaged in severe overkill" in both *New York Times* and *Gertz*. *Id.* at 2952. He suggested the same result could have been reached by limitations on recoverable damages while retaining the common-law standards of liability. *Id.* He noted that Justice Powell explicitly held *Gertz* inapplicable in cases such as *Greenmoss Builders* with respect to presumed and punitive damages and suggested that *Gertz* must likewise be inapplicable insofar as the requirement of some kind of fault on the part of the defendant was concerned. *Id.* at 2953.

⁴³ See *supra* notes 26, 36 and accompanying text.

⁴⁴ *Gertz*, 418 U.S. at 345-47. Justice Powell's opinion recognized an accommodation, "a more equitable boundary," between the strong and legitimate state interest in compensating private individuals for wrongful injury to reputation and the first amendment interest in shielding the press and broadcast media from the chilling effects of liability for defamation. *Id.* at 347-48. In attempting to designate the limits of this boundary line, the majority opinion found that the states have no substantial interest in securing gratuitous money damages far in excess of any actual injury suffered by a private plaintiff such as *Gertz*. *Id.* at 349.

⁴⁵ *Greenmoss Builders*, 105 S. Ct. at 2944-46. Justice Powell on these facts, involving a private individual and speech on matters of purely private concern, explicitly found that the state interest in awarding presumed and punitive damages was "substantial" relative to the effect these remedies might have on "speech of significantly less constitutional interest." *Id.* at 2946.

which he authored in 1974.⁴⁶ Justice Brennan, however, found such a conclusion incongruous because of *Gertz's* rationale in rejecting the *Rosenbloom* approach, the 1971 plurality opinion which he wrote.⁴⁷ Justice White also acknowledged his previous misreading of *Gertz*, but he agreed with the way in which Justice Powell distinguished *Gertz*.⁴⁸ Five Justices on the Court now agree that there is a strong state interest which permits recovery of presumed and punitive, as well as actual, damages absent a showing of actual malice when a private individual has been falsely defamed by defendant's negligent ascertainment of truth or falsity in the publication of statements not involving any matters of public concern.⁴⁹ The stronger state interest is explicitly and solely conditioned on a finding that the expression "do[es] not involve matters of public concern."⁵⁰

II. THE STATE INTEREST

The traditional state interest in this area of common law is the protection of the private personality.⁵¹ Justice Brennan in *Rosenblatt* acknowledged that important social values undergird state defamation laws.⁵² In a concurring opinion in *Rosenblatt*, Justice Stewart emphasized the basic concept on which state defamation law is premised: "[T]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."⁵³ The legal redress for injury to reputation by way of an action for damages

⁴⁶ *Id.* at 2944 n.4.

⁴⁷ *Id.* at 2959, n.11 (Brennan, J., dissenting).

⁴⁸ *Id.* at 2952-53 (White, J., concurring in the judgment); *id.* at 2959 (Brennan, J., dissenting).

⁴⁹ See *supra* note 36 and accompanying text. But see *Greenmoss Builders*, 105 S. Ct. at 2952-53 (White, J., concurring)(advocating common-law standard of liability for the private libel plaintiff).

⁵⁰ *Id.* at 2946, 2948. The phrase used by Chief Justice Burger to designate the new element was "a matter of essentially private concern." *Id.* at 2948 (Burger, C.J., concurring in the judgment). Justice White stated "the defamatory publication in this case does not deal with a matter of public importance." *Id.* at 2954. (White, J., concurring in the judgment).

⁵¹ Brant, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 502-03 (1965); see Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C.D.L. REV. 359, 364-68 (1985)(reputational redress has deep historical roots).

⁵² *Rosenblatt*, 383 U.S. at 86. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Id.*

⁵³ *Id.* at 92.

serves the important public function of having a preventive effect on the future actions of the defendant held liable. In a scathing attack on this state interest in *Garrison*, Justice Douglas, a constitutional absolutist, demonstrated that the philosophy underlying the crime of seditious libel was a creation of the English Court of Star Chamber and that he found it "disquieting" that the same philosophy was applied by the states through their libel laws.⁵⁴ Notwithstanding the Supreme Court's incursions into this exclusive state arena since 1964, the majority of the Court has always recognized the legitimacy of the individual's right to compensation for wrongful injury to his reputation. In *Gertz*, the Court spoke in terms of the "degree" of the legitimate state interest. Under the *New York Times* rule, the state interest was "limited." Under the *Gertz* rule, the state interest reached only so far as damages for actual injury suffered by the private plaintiff, finding that the state had "no substantial interest" in the award of presumed and punitive damages without a showing of actual malice.⁵⁵ In *Greenmoss Builders*, the plurality opinion by Justice Powell found that the state interest in awarding presumed and punitive damages without a showing of actual malice was "substantial" when a private individual was falsely defamed by the publication of speech on matters of purely private concern.⁵⁶ The Court has thus recognized three degrees or levels of state interest which impact the constitutional values set out initially in *New York Times*, producing three basic sets of constitutional criteria for recovery under state defamation laws.⁵⁷

The Court in *Gertz* further held that states could define for themselves any standard of liability for the publisher of a defamatory statement which injured a private individual so long as liability without fault was not imposed.⁵⁸ A state, therefore, presumably must require some fault in the defamatory publication concerning a private plaintiff, and a state may require fault in ascertaining the publication's truth or falsity ranging from mere negligence all the way to *New York Times* "actual malice."

III. THE CONSTITUTIONAL INTEREST

The constitutional values enunciated in *New York Times* and in-

⁵⁴ *Garrison*, 379 U.S. at 83. The Act provided fines and punishment for "false, scandalous and malicious" writings against the government. *Id.*

⁵⁵ *Gertz*, 418 U.S. at 343, 349.

⁵⁶ *Greenmoss Builders*, 105 S. Ct. at 2946.

⁵⁷ *Gertz*, 418 U.S. at 349.

⁵⁸ See *supra* notes 26-27 and accompanying text.

terpreted by subsequent opinions recognize the primacy of the first amendment mandate of freedom of speech and press. The values of robust and uninhibited debate by individuals and the freedom of the press from the pall of self-censorship are extolled as essential for our form of government.⁵⁹ Divergence in views occurs over how to protect this essential public debate.

One troublesome question was answered decisively in *Greenmoss Builders*. The distinction drawn previously by many courts between media and nonmedia defendants was in error.⁶⁰ The Court reiterated that the first amendment protects all who speak on issues protected by the Constitution.⁶¹ The question then is narrowed to "what speech is protected by the Constitution?" The Court has grappled with definitions of "defamatory", "fact",⁶² "false";⁶³ has attempted to define protected speech solely in terms of the status of the injured plaintiff;⁶⁴ and once briefly attempted to solely use the subject-matter definition of "a

⁵⁹ *New York Times*, 376 U.S. at 269-70, 273-75, 282-83. The Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public figures." *Id.* at 270. The Court also recognized that erroneous statement was inevitable in free debate and that essential "breathing space" required the protection of such statements. *Id.* at 271-72, citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). An earlier opinion, *Beauharnais v. Illinois*, 343 U.S. 250, 263-64 (1952), recognized that "public men are, as it were, public property" and that discussion and criticism of them must not be denied or stifled. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (public discussion is fundamental to stable government); Elder, *supra* note 12, at 581 (Madisonian view adopted by Supreme Court).

⁶⁰ *Greenmoss Builders*, 105 S. Ct. at 2959 (Brennan, J., dissenting). *But see Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 418 (Vt. 1983) (Gertz protections do not extend to nonmedia defendants). State court cases have similarly made the distinction. See *id.* at 417 (cases cited as examples); see also Comment, *Greenmoss Builders v. Dun & Bradstreet, Inc.*, 10 Vt. L. Rev. 205 (1985).

⁶¹ *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring); *Greenmoss Builders*, 105 S. Ct. at 2953 and n.4 (White, J., concurring in the judgment). The Court's decision in *Bellotti*, *supra* at notes 30-31 and accompanying text, clearly stated that the identity of the speaker has no bearing on the inherent value of speech which informs the public. *Bellotti*, 435 U.S. at 777. See Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 917, 930-35 (1978) (nonmedia defendants deserve same protection afforded media defendants).

⁶² See Zimmerman, *supra* note 51, at 362-64 and complete text (inability of courts to agree on "defamatory meaning" and on distinction between fact and opinion).

⁶³ *Greenmoss Builders*, 105 S. Ct. at 2950 n.2; see Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212, 1218-19 (1983) (line between true and false speech is not bright).

⁶⁴ See Elder, *supra* note 12, at 608-13, 622 (resolution of controversy concerning threshold determination between status and subject matter in favor of status).

matter of public or general interest.”⁶⁵ The Supreme Court now seems to have come to rest, at least for the present, on a definition and implementation which combines the status of the plaintiff and the subject matter or content of the speech.⁶⁶

This comment advocates an approach more sharply focused on the legitimacy of the public concern in the defamatory speech and on the number of community members who have a need to be informed in order to participate in self-government, in its broadest sense, than the approach advanced in *Greenmoss Builders*.⁶⁷ In accord with *Gertz* and traditional tort law, no cause of action in the area of defamation should

⁶⁵ *Firestone*, 424 U.S. at 456; see *Elder*, *supra* note 12, at 604 (subject-matter standard adopted in *Rosenbloom* plurality opinion). The standard was “matters of public or general concern.” *Id.* The applicable test was “public interest or newsworthiness” which activated the *New York Times* protections. *Id.* Few judgments for plaintiffs were sustained on appeal during the three years prior to the *Gertz* decision. *Id.* at 604 n.105; see also Note, *The First Amendment and the Corporate Plaintiff: Applicability of the New York Times Standard to Corporate Defamation and Product Disparagement*, 19 VAL. U.L. REV. 847, 851 (1985) (public interest test shifted focus from status of plaintiff to public’s right to be informed).

⁶⁶ *Greenmoss Builders*, 105 S. Ct. at 2952-53 (White, J., concurring in the judgment); Note, *The First Amendment and the Corporate Plaintiff: Applicability of the New York Times Standard to Corporate Defamation and Product Disparagement*, 19 VAL. U.L. REV. 847, 851 (1985).

⁶⁷ *Id.* at 2946-47. It is suggested that once minimum liability of at least negligent publication on the part of the defendant is established, recovery by the falsely defamed private plaintiff is governed minimally by constitutional standards. Justice Powell in *Greenmoss Builders* specifically stated that the credit reporting at issue, while a matter of private concern, was not totally unprotected speech. *Id.* It is unclear whether the Court is referring solely to the *Gertz* fault protection or to some other constitutional protection. Justice Powell analogized this purely private speech to commercial speech, which is of public concern, but which is hardy and constitutionally subject to more state regulation than most speech concerning public matters. *Id.* at 2947. The analogy is not helpful if this credit report was in fact purely private speech as Justice Powell stated. *Id.* at 2946-47 and n.8. He cited *Connick v. Myers*, 461 U.S. 138 (1983) and then stated, “We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.” *Id.* at 147. The degree of constitutional protection to be afforded purely private speech is further confused by footnote 6 in *Greenmoss Builders*: “As one commentator has remarked with respect to ‘the case of a commercial supplier of credit information that defames a person applying for credit’ — the case before us today — ‘If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*.’” *Greenmoss Builders*, 105 S. Ct. at 2946 n.6 (quoting Shiffrin, *supra* note 63, at 1268-69). The footnote is in support of the proposition of a more limited role of the Constitution in regulating state libel law when “the concerns that activated *New York Times* and *Gertz* are absent.” *Greenmoss Builders*, 105 S. Ct. at 2946.

exist at all without some degree of fault on the part of the defendant. To be subject to plaintiff's recovery, the defendant must have breached some duty to the plaintiff.⁶⁸ Policy arguments in favor of strict liability are not convincing.⁶⁹ The inherent nature of ambiguity in much of the English language, its rich diversity of usage and the transcendent first amendment concerns justify tolerance of non-negligently published false statements on legitimate matters of public concern.⁷⁰ After *Gertz*, the traditional tort requirement of fault governs all state libel and slander causes of action.⁷¹ It is suggested here that the Court intends that the constitutional protective overlay of *Gertz*, limiting damage recovery by the private individual to actual damages upon proof of at

⁶⁸ *Gertz*, 418 U.S. at 347. Justice White in his *Gertz* dissent and in his concurring opinion in *Greenmoss Builders* urged that the private plaintiff should not be required to surmount the constitutional hurdle of proving fault. He argued that common-law standards of liability should apply. *Id.* at 347 n.10, 375-76. See Shiffrin, *supra* note 63, at 1268 (accord with Justice White). Justice Powell did not mention the *Gertz* fault requirement in the plurality opinion in *Greenmoss Builders*, presumably because the fault basis was never in dispute. The facts clearly revealed negligence by Dun & Bradstreet. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 416 (Vt. 1983); *Greenmoss Builders*, 105 S. Ct. at 2957 (Brennan J., dissenting). Although Justice White deduced inapplicability of the fault requirement from Justice Powell's silence, it seems more reasonable to assume the requirement was clearly met. No mention needed to be made of it in light of the facts and *Gertz*, which spoke unmistakably and unambiguously in its prohibition of strict liability. *Gertz*, 418 U.S. at 347. It is clear that Justice White in 1974 believed to the contrary: "But the Court nevertheless extends the reach of the First Amendment to all defamation actions by requiring that an ordinary citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the publisher beyond the circulation to the public of a damaging falsehood." *Id.* at 388-89, 392 (White, J., dissenting)(emphasis added).

⁶⁹ *Greenmoss Builders*, 105 S. Ct. at 2946 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)). Since the speech is of purely private concern, protection of any category of publisher to facilitate "public debate" is a moot issue. Further, it is infinitely easier today for the defendant to verify information prior to publication, given the electronic information revolution. Rather than inferring that strict liability is thus appropriate, it seems more logical to find the defendant held to a higher standard in the determination of whether he was negligent in his verification of the truth of the defamatory speech. See Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 *FORDHAM L. REV.* 449, 489-90 (1984)(libel-as-malpractice would facilitate formulation of national standard of care for determining fault in verification). The changing nature of the media defendants into mass intermedia consolidations with a resulting singular message also argues for less constitutional shielding. *Gertz*, 418 U.S. at 390-91 and n.28; *Greenmoss Builders*, 105 S. Ct. at 2959 n.9 (Brennan, J., dissenting).

⁷⁰ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); *Garrison*, 379 U.S. at 73-75; *Greenmoss Builders*, 105 S.Ct. at 2951 (White, J., concurring).

⁷¹ See Bloom, *Proof of Fault in Media Defamation Litigation*, 38 *VAND. L. REV.* 247, 335-93, 386 (1985)(42 written opinions since *Gertz* have addressed proof of negligence).

least negligence, is to be activated only by defamatory speech on matters of legitimate public concern in which some number of the citizenry has a vested collective interest.⁷²

The Court in 1974 explicitly rejected the *Rosenbloom* "matters of public or general concern" test which was defined as "mere newsworthiness."⁷³ Justice Brennan in his dissent in *Greenmoss Builders*, however, stated that a fair reading of Justice Powell's plurality opinion led to the conclusion that the opinion was "embracing the approach of the *Rosenbloom* plurality to deciding when the Constitution should limit state defamation law . . . [but, now] speech about matters of public or general interest receives only the *Gertz* protections, . . . not the full *New York Times v. Sullivan* protections . . ."⁷⁴ If Justice Brennan's reading of the plurality opinion is correct, what is to be made of the rationale in *Gertz* written by Justice Powell which rejected *Rosenbloom*'s approach?⁷⁵ The distinction arguably lies in the competing interests the *Rosenbloom* line sought to separate: common law of strict liability on one side, resulting in a highly vulnerable defendant, and *New York Times* actual malice protections on the other side, resulting in a virtually immune defendant.⁷⁶ The contrast was too sharp. Since *Gertz* and now *Greenmoss Builders*, the line separates less extreme interests: state law must require at least negligence in efforts to determine truth or falsity on one side, resulting in a defendant subject to some liability, and *Gertz* restrictive rules controlling recovery of presumed and punitive damages on the other side, resulting in a defendant shielded from chilling presumed and punitive damage awards absent actual malice. The contrast is greatly diminished.

Another distinction is that the interpretation of the *Rosenbloom* "public or general interest" test⁷⁷ to mean "mere newsworthiness"⁷⁸ will probably, and should be discarded for an interpretation of "matter of public concern" more in accord with first amendment values. The public debate worthy of constitutional protection should, it seems, include the concepts of vested and collective interest "relevant to self-government,"⁷⁹ which in common usage involves something more than

⁷² *Greenmoss Builders*, 105 S. Ct. at 2959 and n.11 (Brennan, J., dissenting); *Gertz*, 418 U.S. at 346; *Rosenbloom*, 403 U.S. at 43-45.

⁷³ *Wolston*, 443 U.S. at 167.

⁷⁴ *Greenmoss Builders*, 105 S. Ct. at 2960 n.11 (Brennan, J., dissenting).

⁷⁵ *Gertz*, 418 U.S. at 346.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Wolston*, 443 U.S. at 167-68.

⁷⁹ *Gertz*, 418 U.S. at 346 (quoting Justice Marshall in *Rosenbloom*, 403 U.S. at 79).

"mere newsworthiness." Delineating those matters which concern the vested collective interests of citizens will not be clearcut, but neither should it be any easier or harder than determining the legal concept of negligence. The same objective standard should be applied in both determinations. It appears that broad general rules must of necessity be inadequate in discrete factual situations; no immutable bright line can be drawn. Ad hoc determinations by lower courts seem inevitable, at least initially.⁸⁰

The only guidance for lower courts in determining when constitutional limits on state libel laws will be applicable with regard to the new "subject-matter requirement" will be prior Supreme Court decisions which have used the phrase "matters of public concern." Justice Powell in *Greenmoss Builders* asserted that in every other case in which the Constitution has limited state defamation laws prior to *Greenmoss Builders*, the speech involved was "expression on a matter of undoubted public concern."⁸¹ It is arguable that the *Firestone* speech (1976) did not involve matters of legitimate public concern relevant to self-government of members of the community. In that case, only the status of the plaintiff was addressed under *Gertz*. At that time, of course, the subject matter of the speech was not examined. Other recent Supreme Court decisions have used the subject-matter phrase in contexts other than defamation law.⁸² A chronological review of pertinent decisions follows, limited to decisions using the phrase "matters of public concern" rendered 1980 to 1985.

The decision of *Village of Schaumburg v. Citizens For a Better*

⁸⁰ See Simon, *supra* note 69, at 489 (line between what is allowed and what is not keeps moving, resulting in creation of greatest chilling condition: uncertainty). But see Bloom, *supra* note 71, at 393-94 (principles developed by courts provide guidance; body of precedent fleshing out standards for proving fault has begun to emerge).

⁸¹ *Greenmoss Builders*, 105 S. Ct. at 2944; see *supra* notes 14-38 and accompanying text.

⁸² Supreme Court cases prior to 1980 which contained the phrase "matters of public concern" are: *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Elrod v. Burns*, 427 U.S. 347 (1976); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Kois v. Wisconsin*, 408 U.S. 229 (1972); *Healy v. James*, 408 U.S. 169 (1972); *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Wood v. Georgia*, 370 U.S. 375 (1962); *Roth v. United States*, 354 U.S. 476 (1957); *Weiman v. Undegraff*, 344 U.S. 183 (1952); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1948).

*Environment*⁸³ concerned alleged violations of first and fourteenth amendment rights by enforcement of a municipal ordinance which prohibited door to door solicitation by advocacy-oriented organizations unless 75% of their receipts went to "charitable purposes." The Court affirmed the Seventh Circuit Court of Appeals' holding that the 75% rule could not constitutionally be applied to that class of organizations "whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public concern."⁸⁴

Two decisions were rendered in June, 1980. *Diamond, Commissioner of Patents and Trademarks v. Chakrabarty*⁸⁵ concerned the interpretation of United States patent laws. Holding that the live, human-made micro-organism invented by microbiologist Chakrabarty was patentable subject matter under the statute, the Supreme Court found that the language used by Congress required a broad construction. The construction adopted by the Court included Chakrabarty's product of genetic engineering capable of breaking down multiple components of crude oil.⁸⁶ Its significance was the promise of rapid and efficient oil-spill control.⁸⁷ The dissent by Justice Brennan focused on the question of whether Congress intended the microbiologist to be able to secure a monopoly on a living organism.⁸⁸ He asserted that 35 U.S.C. § 101 did not encompass living organisms and that it was the

⁸³ 444 U.S. 620 (1980). Justice White wrote the majority opinion, joined by all Justices except Justice Rehnquist who dissented.

⁸⁴ *Id.* at 635. The Court agreed that such organizations might easily exceed the 25% administrative expense limit because they used paid solicitors who "necessarily combine" solicitation with "functions of information, discussion, and advocacy of public issues." *Id.* The Court further described the work of such groups as "primarily engaged in research, advocacy, or public education. . . ." *Id.* at 636. Justice Rehnquist's dissent stated that the Court's opinion implied that if the objectives of the particular organization in question had been to provide information about costs and characteristics of goods and services, rather than advocacy on matters of public concern, the ordinance would have been constitutional as applied prior to the Court's ruling in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) which eradicated such distinctions. "This and other considerations led the Court in that case to conclude that no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Schaumburg*, 444 U.S. at 642. He suggested the line was equally as elusive in the instant context as applied to organizations. He further pointed out that the Court gave no guidance on how to identify those organizations who were now constitutionally exempt from such ordinances. *Id.*

⁸⁵ 447 U.S. 303 (1980). The majority opinion by Chief Justice Burger was joined by Justices Stewart, Blackmun, Rehnquist and Stevens. Justice Brennan's dissent was joined by Justices White, Marshall and Powell.

⁸⁶ *Id.* at 305, 318.

⁸⁷ *Id.* at 305 n.2.

⁸⁸ *Id.* at 318 (Brennan, J., dissenting).

role of Congress, not the judiciary, to change the reach of the patent laws, particularly "where, as here, the composition sought to be patented uniquely implicates matters of public concern."⁸⁹

The other case decided in June, 1980, was *Consolidated Edison Co. of New York v. Public Service Commission*.⁹⁰ The Public Service Commission issued an order prohibiting the inclusion by the public utility company of inserts in the monthly billing which discussed public controversies. The inserts urged the development of nuclear power.⁹¹ Finding the PSC order an unconstitutional content-based prohibition of speech, the Court cited *Thornhill v. Alabama*:⁹² "[The first amendment] embraces at the least the liberty to discuss publicly and truthfully all matters of public concern . . ."⁹³

In a memorandum opinion in *Saye v. Williams*,⁹⁴ Justice Rehnquist, dissenting from the denial of writ of certiorari, found that the trial court had struck the wrong balance when it allowed compensatory and punitive damages to plaintiff by holding that the first amendment rights of the plaintiff, a university police officer, outweighed his employer's interests in maintaining discipline. Plaintiff was fired for objecting to the alteration of an accident report involving the chief of the municipal police force, in which the chief was reported to have been drinking. Both the plaintiff and the chief were candidates for the office of county sheriff. Plaintiff disclosed the alteration to his father who leaked the information to the press.⁹⁵ In support of his dissent, Justice Rehnquist quoted *Pickering v. Board of Education*,⁹⁶ which set out the competing interests to be balanced in the employer/employee situation: ". . . the interests of the [employee] as a citizen, in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁹⁷

⁸⁹ *Id.* at 322 (Brennan, J., dissenting).

⁹⁰ 447 U.S. 530 (1980). Justice Powell wrote for the majority which consisted of Chief Justice Burger and Justices Brennan, Stewart, White and Marshall. Justice Blackmun dissented with Justice Brennan joining parts of the dissent.

⁹¹ *Id.* at 532.

⁹² 310 U.S. 88, 101-02 (1940).

⁹³ *Consolidated Edison*, 447 U.S. at 534-35.

⁹⁴ 452 U.S. 926 (1981).

⁹⁵ *Id.* at 926.

⁹⁶ 391 U.S. 563 (1968). The Court unanimously held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574.

⁹⁷ *Id.* at 568. Defendant had sought to introduce evidence and had requested a jury instruction based on the *Pickering* defenses, but both efforts were denied by the trial

Connick v. Myers,⁹⁸ decided in 1983, turned on whether the alleged disruptive speech, a questionnaire, distributed by a public employee involved speech by "a citizen upon matters of public concern" or speech by "an employee upon matters only of personal interest."⁹⁹ The Court explicitly stated that if Myers' questionnaire could not be characterized as speech on a matter of public concern, defined as "relating to any matter of political, social or other concern to the community," there should be no judicial oversight under the first amendment.¹⁰⁰ The Court further expressly stated that even if the speech was not upon a matter of public concern, it was not "totally beyond the protection of the first amendment,"¹⁰¹ and gave as an example: "[A]n employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street."¹⁰² The Court found that Myers' questionnaire,

court. Justice Brennan stated his belief that this was error and that the legal issues should be reviewed by the Court. By jury verdict, the plaintiff was awarded both compensatory and punitive damages. *Saye*, 452 U.S. at 926.

⁹⁸ 461 U.S. 138 (1983). Justice White wrote the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor. Justice Brennan wrote for the dissent and was joined by Justices Marshall, Blackmun and Stevens.

⁹⁹ *Id.* at 147. The Court in *Connick* reviewed the historical and precedential foundation for the proper approach to first amendment speech in the more circumscribed public employment area. *Id.* at 143-46. The Court cited cases involving speech on matters of legitimate public concern in the public employment setting. *Id.* at 145-46. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979)(private exchange between teacher and school administrator concerning allegedly racially discriminatory policies); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)(teacher revealed to radio station contents of memo concerning teacher dress code prompted by pending school bond issue); *Perry v. Sinderman*, 408 U.S. 593 (1972)(testimony before committees of Texas Legislature by teacher concerning whether college should be elevated to four-year status, over which there was public disagreement); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)(criticism of Board of Education by teacher concerning allocation of school funds between athletics and educational programs).

¹⁰⁰ *Connick*, 461 U.S. at 146.

¹⁰¹ *Id.* at 147. While distinguishing Myers' speech from totally unprotected speech such as obscenity, it is not clear from the opinion what such a statement by the Court, which brings the speech within first amendment protection, implies practically. The same statement appears in *Greenmoss Builders*, 105 S. Ct. at 2945.

¹⁰² *Connick*, 461 U.S. at 147. Being mindful that the *Connick* opinion was written by Justice White in 1983, long after his *Gertz* dissent in 1974, and two years before his concurring opinion in *Greenmoss Builders* in 1985, Justice White expressed in *Connick* that in a libel action, false statements *not* of public concern would receive *Gertz* protections, presumably referring to both elements of *Gertz*: the fault barrier and the damages restrictions. This conclusion is consistent with his concluding paragraph in *Connick* which clearly stated that the speech *fully* protected by the first amendment was speech

with the exception of one question, involved matters of public concern in only a limited sense. The speech was most accurately characterized as "an employee grievance concerning internal office policy."¹⁰³ Therefore, Myers' discharge by Connick under *Pickering* balancing was not a violation of the first amendment.¹⁰⁴ The test used by the Court for determination of whether an employee's speech addressed a matter of public concern was "the content, form, and context of a given statement, as revealed by the whole record."¹⁰⁵

In 1984, the Supreme Court expressed no view but accepted the ruling by the First Circuit Court of Appeals applying *New York Times* to a product disparagement case, *Bose Corp. v. Consumers Union of the United States*.¹⁰⁶ The Court found that it had a constitutional duty to determine whether particular speech was suppressable and that procedurally both the clearly erroneous standard of review in Rule 52(a) of the Federal Rules of Civil Procedure and the *New York Times* standard of review which mandates "an independent examination of the whole record" must be satisfied.¹⁰⁷ In a footnote the Court noted two categories of speech which did not receive full first amendment protection, commercial speech and "[s]tatements made by public employees in their employment capacity and not touching on matters of public concern . . . [since] employment related sanctions may be imposed on the basis of such statements."¹⁰⁸

upon issues of public concern. *Id.* at 154.

¹⁰³ *Id.* at 154.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 147-48. The Court noted that the inquiry into the protected status of speech was one of law, not fact, and that the Court must independently examine the statements in issue to make the determination. *Id.* at 148 n.7 and 150 n.10. The same test was employed by Justice Powell in *Greenmoss Builders*, 105 S. Ct. at 2947. The grafting of the *Connick* test into the area of libel law was criticized by Justice Brennan in his dissent to *Greenmoss Builders*. *Id.* at 2962 n.14 (Brennan, J., dissenting).

The dissenting Justices in *Connick* (Justices Brennan, Marshall, Blackmun and Stevens), asserted that speech about how government is operated or should be operated was central to the purpose of the first amendment. Myers' speech addressed such matters and did not adversely affect the employer's operations. *Connick*, 461 U.S. at 156. Justice Brennan provided a review of what the Court has previously stated constitutes matters of public concern and the problems inherent in courts making such a "delicate inquiry." *Id.* at 164, 165 n.5. (Brennan, J., dissenting).

¹⁰⁶ 104 S. Ct. 1949, 1966 (1984). Justice Stevens wrote the majority opinion. Justices White and Rehnquist dissented with Justice O'Connor joining Justice Rehnquist's dissent.

¹⁰⁷ *Id.* at 1959, 1963-64 and n.25.

¹⁰⁸ *Id.* at 1961-62 n.22 (citing *Connick v. Myers*, 461 U.S. 138 (1983)); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Pickering v. Board of Educ.*, 391

In *F.C.C. v. League of Women Voters of California*,¹⁰⁹ section 399 of the Public Broadcasting Act of 1967 which prohibited a noncommercial educational station which received federal grant monies from "engag[ing] in editorializing," was held unconstitutional. In determining the limited reach of the Congressional act, the Court stated that the statute improperly foreclosed "expression of editorial opinion on 'controversial issues of public importance,'" ¹¹⁰ . . . "even in a balanced and fair manner."¹¹¹ Finding that the breadth of editorial comment was potentially as broad as human imagination, the Court found no federal interest sufficient to justify a complete editorial ban of station management views.¹¹² The focus of the decision was the danger of potential governmental interference in determination of who makes broadcast judgments rather than what constitutes matters of public concern.¹¹³

In a decision handed down one day after *F.C.C. v. League of Women Voters of California*, the Supreme Court rendered the decision in *Regan v. Time, Inc.*¹¹⁴ Justice White's plurality opinion held that 18 U.S.C. § 504, permitting the illustration of United States currency only for certain purposes, was an unconstitutional content-based restriction, but that size and color restrictions on the illustrations were valid as

U.S. 563 (1968).

¹⁰⁹ 104 S. Ct. 3106 (1984). Justice Brennan wrote for the majority. Justices Rehnquist, White, Stevens and Chief Justice Burger dissented.

¹¹⁰ *Id.* at 3118. Justice Brennan analogized the instant statutory prohibition on editorializing to the ban on bill inserts discussing nuclear power which was applied by the New York Public Service Commission in *Consolidated Edison*, *supra* notes 90-93 and accompanying text.

¹¹¹ *League of Women Voters*, 104 S. Ct. at 3121.

¹¹² *Id.* at 3127. The Court found the statute was not narrowly tailored to accomplish any of the specific governmental interests advanced. The Court further stated:

Moreover, the public's "paramount right" to be fully and broadly informed on matters of public importance through the medium of noncommercial educational broadcasting is not well served by the restriction, for its effect is plainly to diminish rather than augment "the volume and quality of coverage" of controversial issues [cite omitted]. Nor do we see any reason to deny noncommercial broadcasters the right to address matters of public concern on the basis of merely speculative fears of adverse public or governmental reactions to such speech.

Id.

¹¹³ *Id.* at 3121-23 and n.18 (legislative history of § 399 of the Public Broadcasting Act).

¹¹⁴ 104 S. Ct. 3262 (1984). Justice White delivered the plurality opinion joined by Chief Justice Burger, Justice Rehnquist and Justice O'Connor. In divergent opinions other Justices dissented in part and concurred in part. Eight justices agreed that the purpose requirement was unconstitutional. *Id.* at 3272 n.14.

reasonable manner regulations.¹¹⁵ Justice Brennan, joined by Justice Marshall, dissenting, argued that the statute's restrictions were unconstitutional *in toto* since illustrations are a form of first amendment expression for which there is no genuine substitute. In particular, he urged that "the image of money . . . is an especially evocative and powerful way of communicating ideas about matters of public concern" ¹¹⁶

In 1985, the Supreme Court denied a petition for writ of certiorari in *Rowland v. Mad River Local School District*.¹¹⁷ Justice Brennan filed a dissent from the denial, in which Justice Marshall joined. He stated the need for the Supreme Court to address the issues presented by the facts. The nontenured public high school guidance counselor was fired because she revealed her private sexual preference, which was bisexual, to her secretary and fellow teachers.¹¹⁸ The jury found that her revelation did not interfere in any way with her performance or the school's functioning, and they awarded damages for personal humiliation, mental anguish and lost earnings.¹¹⁹ The Sixth Circuit Court of Appeals reversed, citing *Connick v. Myers*,¹²⁰ concluding the guidance counselor's mention of her bisexuality was not about a matter of public concern. Justice Brennan questioned the Sixth Circuit's conclusion on two grounds: (1) the speech did involve a matter of public concern; or (2) even if this was private speech, it was entitled to constitutional protection since it did not interfere with the employer's business.¹²¹ Justice Brennan noted that *Connick* referred to issues of "inherent" public concern such as racial discrimination and he equated the current topic of homosexuality with such issues.¹²² Agreeing, *arguendo*, that

¹¹⁵ *Id.* at 3267, 3272.

¹¹⁶ *Id.* at 3273, 3282 (Brennan, J., dissenting).

¹¹⁷ 105 S. Ct. 1373 (1985)(mem.)(Brennan, J., dissenting from denial of writ of certiorari).

¹¹⁸ *Id.* at 1374.

¹¹⁹ *Id.* The trial court relied on *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

¹²⁰ *Rowland*, 105 S. Ct. at 1374; see *supra* notes 98-105 and accompanying text. Justice Brennan quoted from the *Connick* holding: "[i]f 'employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,' disciplinary measures taken in response to such expression cannot be challenged under the First Amendment 'absent the most unusual circumstances.'" *Id.* at 1375 (quoting *Connick*, 461 U.S. at 146).

¹²¹ *Rowland*, 105 S. Ct. at 1375.

¹²² *Id.* He further argued that the uninhibited debate desirable on public issues under the first amendment begins with one instance of speech on a volatile issue which triggers that debate and that the first statement in the public debate should not go unprotected. *Id.* at 1375-76. Justice Brennan asserted that "[i]t is the *topic* of the speech at issue, and not whether a debate on that topic is yet ongoing. . . ." *Id.* at 1376.

the speech involved was not on a matter of public concern, Justice Brennan noted that *Connick* had reserved the "substantial constitutional question" of whether the public employee's private speech is totally outside first amendment protections when it is nondisruptive.¹²³

In a memorandum decision, *Lorain Journal Co. v. Milkovich*,¹²⁴ handed down after *Greenmoss Builders*, two Justices, dissenting from a denial of writ of certiorari, found the Ohio Supreme Court's interpretation of "public figure" to be exceptionally narrow and likely to result in self-censorship by the press. The Ohio court determined that the high school wrestling coach, who was censured by the Ohio High School Athletic Association for his conduct in encouraging a brawl in conjunction with a wrestling match, was not a public official or public figure insofar as his libel suit against the local newspaper who reported these events was concerned. Therefore, as a private individual, in order to recover actual damages, he need only prove the report was false and was published negligently, rather than with actual malice.¹²⁵ Justice Brennan argued that the coach, under *Rosenblatt v. Baer*,¹²⁶ was clearly the sort of public employee to which the *New York Times* actual malice standard applied.¹²⁷ Quoting *Gertz*, he stated that the ultimate touchstone was whether the individual had achieved such "prominence in the affairs of society" that they invited attention and comment.¹²⁸ Justice Brennan further noted that the *New York Times* standard was not limited in application to those individuals who deliberately injected themselves into public issues to influence their outcome. "Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern,"¹²⁹ citing

¹²³ *Id.* Justice Brennan stated that *Rowland* posed "the open question whether nondisruptive speech ever can constitutionally serve as the basis for termination under the First Amendment." *Id.* He further discussed the equal protection challenge raised. *Id.* at 1376-79. He believed that the case raised constitutional questions relating to an issue of "national importance" and that the petition should have been granted. *Id.* at 1379.

¹²⁴ 106 S. Ct. 322 (1985)(mem.)(Brennan, J., dissenting from denial of petition for writ of certiorari). Justice Marshall joined in the dissent.

¹²⁵ *Id.* at 323-25. Justice Brennan concluded that the rules used to determine an individual's status as "public" or "private" could negatively influence the decisions made by the press concerning what to publish or what not to publish. *Id.* at 323.

¹²⁶ See *supra* notes 18-19 and accompanying text.

¹²⁷ *Id.* at 325-26.

¹²⁸ *Gertz*, 418 U.S. at 345. Justice Brennan analogized *Milkovich's* role to that of General Walker's in *Curtis Publishing Co. v. Butts*, see *supra* notes 20-21 and accompanying text.

¹²⁹ *Milkovich*, 106 S. Ct. at 329.

Greenmoss Builders.¹³⁰ He further asserted that the national commitment to uninhibited, robust and wide open debate applied as much to local issues as to national issues. He dissented, he stated, because the decision below, by not requiring proof of actual malice, would stifle public debate about important local issues.¹³¹

IV. RECOVERY FOR THE LIBEL PLAINTIFF

While there is little disagreement on the Supreme Court about what interest is being protected by the first amendment—public discussion about matters of legitimate public concern¹³²—there is wide disagreement concerning where the line dividing substantial state interest from constitutional interest is to be drawn. It appears that the majority of the Court would hold that in the area of defamation law the line would be drawn so as to encompass almost all, if not all, speech. The chart below sets out the Court's implementation of the constitutional protections based upon plaintiff's status and the subject matter of the defamatory speech, resulting in a recovery of damages limited according to category.

Justice White, in his concurring opinion in *Greenmoss Builders*,¹³³ reviewed the common law of defamation prior to *New York Times*.¹³⁴ He emphasized that prior to 1964 the state, at the very least, awarded nominal damages for any defamatory publication actionable per se even when the plaintiff was unable to prove reputational injury, thus providing public vindication to the defamed plaintiff.¹³⁵ He urged that common-law standards of liability should have been retained, thereby allowing the libeled plaintiff to obtain a "judgment of falsehood without having to establish any kind of fault."¹³⁶ He reasoned that since the plurality opinion in *Greenmoss Builders* explicitly held *Gertz* inapplicable with respect to its requirement of proof of actual malice for recovery of presumed and punitive damages, it followed that *Gertz* must likewise be inapplicable insofar as its requirement for any kind of

¹³⁰ *Greenmoss Builders*, 105 S. Ct. at 2943-46.

¹³¹ *Milkovich*, 106 S. Ct. at 330.

¹³² *Id.* at 329.

¹³³ *Greenmoss Builders*, 105 S. Ct. at 2948 (White, J., concurring in the judgment).

¹³⁴ *Id.* at 2948-49.

¹³⁵ *Id.* at 2949. Justice White's shift in position back toward state common-law dominion was not shared *in toto* by even the most conservative members of the Court. Justices Rehnquist and O'Connor joined the plurality opinion and Chief Justice Burger separately concurred. *Id.* at 2941, 2948; see *supra* note 42 and accompanying text.

¹³⁶ *Id.* at 2952 n.3.

	STATE INTEREST ?	FIRST AMENDMENT CONSTITUTIONAL INTEREST		
		<i>Greenmoss Builders</i>	<i>Gertz</i>	<i>New York Times</i>
STATUS	private individual	private individual	private individual	public official public figure
SUBJECT MATTER	private matter	private matter	public matter	public matter
FAULT BASIS	presumed malice?	at least negligent publication; common law malice	at least negligent publication; common law malice	actual malice publication
Damages for which the defendant is liable:				
RECOVERY	Actual presumed punitive upon showing false publication	actual presumed punitive upon showing negligence	actual upon showing of negligence; presumed punitive upon showing actual malice	actual presumed punitive upon showing actual malice

fault on the part of the defendant was concerned.¹³⁷ It is unclear whether upon a different set of facts involving a falsely defamed private plaintiff concerning a purely private matter where the defendant was totally without fault in his determination of the publication's truth or falsity, the Court would hold that such speech had crossed from the constitutionally protected area into the exclusive state interest area, leaving behind even the *Gertz* requirement, but it seems highly unlikely. Such a case has not yet reached the Supreme Court.

It is possible to speculate that the *Firestone* case might have been such a set of facts: private individual, the wife of a wealthy heir; arguably a private matter, divorce action; fault basis, *Time* may not have been negligent in its ascertainment of truth or falsity. The Court in *Firestone* remanded for a determination of whether the defendant had been negligent. The holding, while not addressing the public or private nature of the subject matter of the speech, stated that Mrs. Firestone could not recover from *Time* unless the *Gertz* requirement of some fault in ascertaining truth or falsity of the publication was proved. Would the additional consideration of the legal determination, required under *Greenmoss Builders*, that the speech involved "no legiti-

¹³⁷ *Id.* at 2953.

mate matter of public concern relevant to self-government" make a difference? It seems that if *Time* were not negligent in its verification, there would be no recovery at all; however, if *Time* were found to be negligent, the subject-matter determination would make a significant difference in Mrs. Firestone's recovery today.

The recovery available to the libel plaintiff after *Greenmoss Builders* consists of three alternatives, requiring increasingly heavy burdens of proof as plaintiff moves from *Greenmoss Builders* toward *New York Times*, depending on plaintiff's status, the subject matter of the defamatory speech and the degree of fault by the defendant in his ascertainment of the truth or falsity of the speech. The first category is the *New York Times* public official/figure who may recover actual, presumed and punitive damages upon proving actual malice; the second category is the *Gertz* private individual who, when the speech involves matters of public concern, may recover actual damages upon a showing of negligence and may only recover presumed and punitive damages upon a showing of actual malice. Following *Greenmoss Builders*, a third category of plaintiffs may recover if they satisfy the new constitutional criteria: the private individual who, when the speech involves no matters of public concern, may recover actual, presumed and punitive damages upon a showing of negligence.

Is this new category a definable, workable category? Is the distinguishing element in *Greenmoss Builders*—"speech involving no matters of public concern"—any easier to define than was *Rosenbloom*'s "speech involving an issue of public and general concern,"¹³⁸ which was explicitly rejected as unworkable in *Gertz*?¹³⁹ Justice Marshall's phrase in his *Rosenbloom* dissent, "information [which] is relevant to self-government," seems somehow more descriptive of first amendment speech, but it is still without boundaries.¹⁴⁰ The various phrases used in *Greenmoss Builders* do not aid in the determination: "speech involving no matters of public concern";¹⁴¹ "speech on matters of purely private concern";¹⁴² "speech address[ing] a matter of public concern";¹⁴³

¹³⁸ *Rosenbloom*, 403 U.S. 29 (1971).

¹³⁹ *Gertz*, 418 U.S. at 346. The *Gertz* majority noted the difficulty and inappropriateness of ad hoc decisions by state and federal judges in determining which speech addressed issues of "general or public interest." The *Gertz* Court in 1974 stated they doubted the wisdom of committing such determinations to the "conscience of judges." *Gertz*, 418 U.S. at 346; see *Greenmoss Builders*, 105 S. Ct. at 2959 n.11 (lack of trust in courts deciding what speech was of public concern).

¹⁴⁰ *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting).

¹⁴¹ *Greenmoss Builders*, 105 S. Ct. at 2946.

¹⁴² *Id.*

"statements [which] do not involve matters of public concern."¹⁴⁴ The only guidance given by the Court is the transplanted test from *Connick* for determination of whether the speech involves a matter of public or private concern, which is the evaluation of the content and form of the speech in the context of its publication.¹⁴⁵

The phrase used by Justice Brennan in *Milkovich*, "public discussion about matters of legitimate public concern," labels the context and the speech which will receive constitutional protection.¹⁴⁶ The context is "public discussion," implying the involvement of at least some small number of community members.¹⁴⁷ The addition of the word "legitimate" arguably incorporates Justice Marshall's phrase of "relevant to self-government." The boundaries of the new subject-matter requirement must be determined on a case by case basis, at least in the early years after its establishment. A period of uncertainty is necessary in the evolution of any area of law. The new category of plaintiffs distinguished in *Greenmoss Builders* is but a further refinement and narrowing of the scope of constitutional protections in libel law, which is in keeping with the current trend of the Court.

V. CONCLUSION

A case presently before the Supreme Court involving libel law is *Philadelphia Newspaper, Inc. v. Hepps*.¹⁴⁸ The facts involved a private plaintiff libeled in several newspaper articles concerning his alleged connections with certain named "underworld" figures and to organized crime. These activities are clearly and legitimately matters of public concern.¹⁴⁹ The plaintiff in *Hepps* is a *Gertz* plaintiff. The legal questions presented in *Hepps* focus on the Pennsylvania statute which

¹⁴³ *Id.* at 2947 (quoting *Connick*, 461 U.S. at 147-48).

¹⁴⁴ *Greenmoss Builders*, 105 S.Ct. at 2948.

¹⁴⁵ *Id.* at 2947 (quoting *Connick*, 461 U.S. at 147-48). The Court in *Greenmoss Builders* analogized the credit report at issue to commercial speech. Assuming that the plurality opinion was analogizing based on the specific factual context in *Greenmoss Builders* and was not categorizing all credit reporting per se, that portion of the opinion recedes in significance and, as Justice Powell suggests, a different analysis concerning a credit report might be called for under different facts. *Greenmoss Builders*, 105 S.Ct. at 2947 n.8; cf. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir. 1973)(credit report not a matter of general or public interest because publication must be kept in strict confidence by contract terms).

¹⁴⁶ *Milkovich*, 106 S. Ct. at 329 (Brennan, J., dissenting from denial of certiorari).

¹⁴⁷ *Id.* at 330 n.9.

¹⁴⁸ *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984); *prob. juris. noted*, 53 U.S.L.W. 3747 (U.S. June 24, 1985)(No. 84-1491).

¹⁴⁹ *Hepps*, 485 A.2d 374 (Pa. 1984).

requires the defendant to bear the burden of proving the truth of its publication, while the plaintiff is given the presumption of falsity based solely on the defamatory nature of the speech. The constitutionality of the presumption and the defendant's burden of proof will be addressed by the Court. It is thus likely that the decision in *Hepps* when rendered will not address directly the issue presented in *Greenmoss Builders*.¹⁵⁰

The constitutional standard now put in place by the Supreme Court in *Greenmoss Builders* does enhance responsible and truthful public debate. The argument will undoubtedly be raised that *Greenmoss Builders* will chill free speech because of the uncertainties concerning the scope of matters of legitimate public concern. Nonetheless, the powerful restraint on false and defamatory speech concerning a private plaintiff when purely private matters are involved, created by potential liability for presumed and punitive damages though still requiring at least negligence in the publisher's efforts to ascertain truth or falsity, is arguably desirable for a more equitable balance between the private plaintiff's reputational interest and responsible exercise of the first amendment rights of the defendant.

Several conclusions seem justified. It seems likely that all state libel law has been constitutionalized to the extent of the *Gertz* requirement, which mandates that a state may not impose liability without fault.¹⁵¹ Justice White's concurring opinion in *Greenmoss Builders*, which advocated a return to common-law standards of liability, seems unlikely to be adopted by other members of the Court. However, his argument that the Court, by engaging in severe overkill in both *New York Times* and *Gertz*, has created barriers to injured plaintiffs who should be entitled to public vindication when falsely defamed, even when they are unable to prove any fault by the defendant, merits reflective evaluation.¹⁵²

Five Justices in *Greenmoss Builders* held that the distinguishing element in the case was that the defamatory speech involved no matter of public concern. The boundaries of this subject-matter standard will be the crux of future private plaintiff defamation actions.¹⁵³ It seems even conceivable that a public official or public figure could allege that some discrete facet of his life was of purely private concern, and thus that he was entitled in that limited capacity to be a *Greenmoss Build-*

¹⁵⁰ *Hepps*, 53 U.S.L.W. at 3747.

¹⁵¹ See *supra* notes 26-27 and accompanying text.

¹⁵² See *supra* note 42 and accompanying text.

¹⁵³ See *supra* notes 36-38 and accompanying text.

ers plaintiff.

Use of the essential subject-matter phrase by the Supreme Court from 1980 through 1985 revealed certain speech which either implicitly or explicitly qualified as involving "matters of public concern": information researched and disseminated by fund-raising advocacy organizations;¹⁶⁴ matters related to environmental concerns;¹⁶⁵ information distributed to the public about nuclear power;¹⁶⁶ matters related to a political candidate's request to alter an official record to conceal information about himself;¹⁶⁷ information concerning products in the marketplace;¹⁶⁸ any matter which might be the subject of editorializing by noncommercial educational stations;¹⁶⁹ qualified illustrations of United States currency;¹⁶⁰ and matters related to local athletic controversies.¹⁶¹ Matters which were held not to be of public concern were matters related to a public employee's questionnaire which solicited views of other employees concerning internal office policy;¹⁶² and matters related to a public employee's sexual preference revealed to co-employees.¹⁶³

As can be observed from the above determinations, it would not be difficult to focus the argument in such a way on any given set of facts so that a particular defamatory statement could be construed to fall on one side or the other of the "legitimate public concern" line. Policy considerations then become crucial to an understanding of how the Supreme Court would be likely to rule on that given set of facts. Certain issues could perhaps be classified as matters of "inherent public concern, such as racial and political issues. Beyond a few limited categories, however, the Court will engage in balancing. It will balance what it considers to be the need for public debate on a legitimate public issue against the individual's reputational interest, traditionally protected by the state. In accord with the conservative mood presently influencing the Court, *Greenmoss Builders* put in place a constitutional standard which recognizes the substantial strength of the state

¹⁶⁴ See *supra* notes 83-84 and accompanying text.

¹⁶⁵ See *supra* notes 85-89 and accompanying text.

¹⁶⁶ See *supra* notes 90-93 and accompanying text.

¹⁶⁷ See *supra* notes 94-97 and accompanying text.

¹⁶⁸ See *supra* notes 106-07 and accompanying text.

¹⁶⁹ See *supra* notes 109-13 and accompanying text.

¹⁶⁰ See *supra* notes 114-16 and accompanying text.

¹⁶¹ See *supra* notes 124-31 and accompanying text.

¹⁶² See *supra* notes 98-105 and accompanying text.

¹⁶³ See *supra* notes 117-23 and accompanying text.

interest in protecting the private individual.¹⁶⁴ By manipulating the remedies available to the libel plaintiff, the Court has unquestionably created restraints on first amendment speech in varying degrees. Conversely, the defendant in the defamation action is never strictly liable to the plaintiff and the burden of proof on the plaintiff increases as the defamatory speech approaches that speech which is at the heart of first amendment concerns: speech involving matters of legitimate public concern—that speech which is relevant to self-government because it enhances enlightened decisionmaking both politically and individually. Perhaps with *Greenmoss Builders* the Supreme Court has brought within constitutional scrutiny all state libel law. In any case, a more equitable balance has been created with the addition of *Greenmoss Builders*. The Court has now rendered a trio of landmark decisions in the area of libel law—*New York Times*, *Gertz*, and *Greenmoss Builders*—which in time should provide workable constitutional standards applicable to the entire spectrum of libel law.

G. Kay Lord Trapp

¹⁶⁴ See *supra* notes 36-38 and accompanying text. See *Greenmoss Builders*, 105 S. Ct. at 2964 n.16 (Brennan, J., dissenting)(*Greenmoss Builders* characterized as a return to state common law).

FERGUSON V. WATKINS: THE VORTEX WITHIN MISSISSIPPI DEFAMATION LAW

Mississippi has often had and deserved the reputation of being one of the most conservative states in the union. This is especially true as concerns this state's protection of individual and constitutional rights. In the area of defamation the Mississippi Supreme Court has often considered the right of a person to redress defamatory remarks paramount to the freedoms of speech and of the press, at times to the point of absurdity. For example, the court has held that to refer to a woman as a "bitch"¹ or to call a white person a "Negro" is defamatory and may be actionable per se.² Yet recently the state supreme court, as well as the state as a whole, has begun a noticeable shift toward the protection of individual rights.³ Contrasted with the United States Supreme Court's shift in the opposite direction under the leadership of Chief Justice Burger,⁴ the change is both ironical and startling. As penned by a reknowned student of Mississippi and federal law:

With Reagan in the White House
and Rehnquist on the Bench,

Is there harbor for a bleeding heart
when he's in a pinch?

There is a place in Jackson, Miss
on the corner of West and High

Where hope is found in the present storm

¹ See *Interstate Co. v. Garnett*, 154 Miss. 325, 349, 122 So. 373, 380-81 (1929)(if jury determined term "bitch" as used by defendant meant "'a wench or lewd woman'" it would be slander per se).

² See *Natchez Times Publishing Co. v. Dunigan*, 221 Miss. 320, 326, 72 So. 2d 681, 684 (1954)(in Mississippi publishing that a white woman is a Negro is libelous per se).

³ See, e.g., *In re Brown*, 478 So. 2d 1033, 1040 (Miss. 1985)(Mississippi constitution provides right of privacy which includes right to refuse blood transfusion); cf. *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985)(in medical malpractice context, Mississippi will henceforth apply national standard of care); R. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 Miss. L.J. 371, 420-21 (1984)("we will witness in Mississippi and elsewhere the assumption of that responsibility [protection of individual rights] in ways never before thought possible").

⁴ See, e.g., *United States v. Leon*, 104 S. Ct. 3405, 3415 (1984)(evidence obtained illegally was admissible where officer acts in objectively reasonable, good faith reliance on validity of search warrant).

and some relief may lie.⁵

This comment deals with the area of defamation law and particularly the recent case of *Ferguson v. Watkins*⁶ which extended Mississippi protection of freedom of the press and of speech beyond the protection required by the United States Supreme Court. Prior to 1964, a prima facie case of libel or slander was made out by alleging and proving publication of a false and defamatory statement of fact, or of opinion implying the existence of underlying facts known to the publisher, about the plaintiff.⁷ In 1964, the United States Supreme Court in the landmark decision of *New York Times v. Sullivan*⁸ held that the first amendment required public officials to prove "actual malice" in order to recover in a defamation action. "Actual malice" was defined as knowledge of falsity or reckless disregard for the truth.⁹ Since then the Supreme Court has applied this standard to public figures but has refused to apply it where the remarks relate merely to a matter of public interest.¹⁰ In *Ferguson v. Watkins*, the Mississippi Supreme Court for the first time applied the actual malice standard to "vortex public figures" — those persons involved voluntarily or involuntarily in any matter of legitimate public interest.¹¹

The purpose of this comment is to examine the scope of the "vortex public figure." In order to do this, brief mention must be made of

⁵ The author, a member of the federal judiciary, wished to remain anonymous. "West and High" is the location of the Mississippi Supreme Court in Jackson, Mississippi.

⁶ 448 So. 2d 271 (Miss. 1984).

⁷ See W. PROSSER & W. KEATON, *THE LAW OF TORTS* § 111 (5th ed. 1984). Malice and damages were generally presumed; see also *Natchez Times Publishing Co. v. Duni-gan*, 221 Miss. 320, 326-27, 72 So. 2d 681, 684-85 (1954) (damages and malicious intent are presumed where words are actionable per se).

In Mississippi, defamation actions are in part governed by statute. MISS. CODE ANN. § 95-1-1 (1972) provides that all words considered insulting and "calculated to lead to a breach of the peace, shall be actionable." *Id.* MISS. CODE ANN. § 95-1-5 (1972) requires that a plaintiff in a defamation action must, at least ten days prior to filing suit, request radio- or television-defendants to issue a retraction. *Id.*; see also MISS. CODE ANN. § 11-7-61 (1972) (mitigating circumstances may justify reduced damages); MISS. CODE ANN. § 15-1-35 (Supp. 1985) (one-year statute of limitations for libel and slander); MISS. CODE ANN. § 23-3-33 (1972) (prohibition of false charges of dishonesty, immorality or lack of integrity); MISS. CODE ANN. § 23-3-35 (1972) (liability of newspapers regarding editorials concerning political candidates).

⁸ 376 U.S. 254 (1964).

⁹ *Id.* at 280.

¹⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974) (actual malice required only where plaintiff is public official or public figure).

¹¹ See *Ferguson*, 448 So. 2d at 277-78.

pertinent federal law. A more in depth examination of Mississippi law will follow, culminating with conclusions drawn from both state and federal law.

I. THE DISTINCTION BETWEEN PUBLIC OFFICIALS AND PUBLIC FIGURES

The scope of the vortex public figure cannot be properly examined without first defining the terms "public figure" and "public official." The importance of whether a plaintiff is a public official or figure should be general knowledge to most practicing trial lawyers. If the plaintiff is a public official or figure, he must prove "actual malice" in order to maintain an action. That is, he must prove that the defendant made the allegedly defamatory statement with "knowledge that it was false or with reckless disregard of whether it was false or not."¹²

In the most basic sense "public officials" are "those who hold governmental office."¹³ However, this definition needs further clarification. In *Rosenblatt v. Baer*¹⁴ the United States Supreme Court stated that public officials are those "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."¹⁵ The Court elaborated further saying that "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees," that person must prove actual malice in order to recover in a defamation action.¹⁶ Of course elected officials fall within the *Rosenblatt* definition of public official. Additionally, lower-level government employees, such as school principals,¹⁷ city policemen¹⁸ and state highway patrolmen,¹⁹

¹² *New York Times*, 376 U.S. at 280; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974)(actual malice requirement applies only to public officials and public figures).

¹³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

¹⁴ 383 U.S. 75 (1966).

¹⁵ *Id.* at 85.

¹⁶ *Id.* at 86. The court held that, because of the national commitment to freedom of the press and open debate of public issues, whether a person is a public official would be a matter of federal rather than state law. *Id.* at 84.

¹⁷ See *Reaves v. Foster*, 200 So. 2d 453, 458-59 (Miss. 1967)(school principal required to meet standards set by *New York Times*).

¹⁸ See *Pride v. Quitman County Voters League*, 226 So. 2d 735, 737 (Miss. 1969)(city policeman stated cause of action where defendant admittedly published editorial with knowledge of falsity).

¹⁹ See *N.A.A.C.P. v. Moody*, 350 So. 2d 1365, 1369 (Miss. 1977). The court referred to Moody as a "public figure"; however, his only foray into public life was the perform-

have been found to be public officials.

The scope of the public figure status is best defined in an oft-quoted passage from *Gertz v. Robert Welch, Inc.*:²⁰

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.²¹

Under this definition, a person may attain public figure status in either of two ways. First, he may be so prominent that he is a public figure for all purposes. Secondly, he may have thrust himself into the forefront of a particular controversy. It is the latter type, sometimes referred to as the limited purpose public figure, which has spawned the most litigation.

The *Gertz* Court also recognized that hypothetically a person might involuntarily become a public figure, although such a case would be extremely rare.²² In keeping with this prediction, the Supreme Court has consistently refused to allow a person to be drawn involuntarily into a public controversy so as to become a "public figure." Thus, in *Time, Inc. v. Firestone*,²³ the Court held that public attention generated by a scandalous divorce proceeding involving the plaintiff was insufficient to make her a public figure.²⁴ The Court reasoned that, although the divorce had received widespread media attention, involvement in a judicial proceeding is not in reality a voluntary act; thus, the plaintiff had not thrust herself into the public eye.²⁵ Simi-

ance of his duties as a highway patrolman. *Id.* at 1366-68. Furthermore, the court noted the trial court's jury instruction that Moody was a "'public figure' with substantial responsibility in the conduct of governmental affairs." *Id.* at 1369; see *supra* note 15 and accompanying text. Apparently the court meant to refer to Moody as a "public official."

²⁰ 418 U.S. 323 (1974).

²¹ *Id.* at 345. In *Rosenbloom v. Metromedia, Inc.*, 413 U.S. 29 (1971), the Court extended first amendment protection of speech to comments concerning matters of public interest. The *Gertz* decision expressly repudiated the *Rosenbloom* extension as abridging a "legitimate state interest to a degree that [was] . . . unacceptable." *Gertz*, 418 U.S. at 346.

²² *Gertz*, 418 U.S. at 345.

²³ 424 U.S. 448 (1976).

²⁴ *Id.* at 454-55.

²⁵ *Id.*

larly, in *Wolston v. Reader's Digest Association*,²⁶ it was held that a plaintiff's involvement in a grand jury proceeding did not entitle the defendant to a defense based upon lack of "actual malice."²⁷ In *Wolston*, the defendant asserted that by failing to respond to a grand jury subpoena Wolston had attracted public attention and thereby become a public figure. Emphasizing that involvement in a matter of public concern was not enough to invoke the first amendment protection of free speech and that Wolston's failure to respond to the grand jury was not calculated to draw attention or invite comment, the Supreme Court held that the plaintiff was not a public figure required to prove "actual malice."²⁸

The Supreme Court has also held that mere management of public funds is insufficient to create a public figure. In *Hutchinson v. Proxmire*,²⁹ Ronald Hutchinson, a research scientist studying the effects of stress on primates with aid of federal funding, filed a defamation action against Senator William Proxmire.³⁰ Proxmire had awarded Hutchinson the infamous "Golden Fleece of the Month Award," an award signifying wasteful use of tax funds.³¹ Proxmire defended on the basis that Hutchinson was a public figure and that he had not proven actual malice.³² The Court responded:

Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure. If it were, everyone

²⁶ 443 U.S. 157 (1979).

²⁷ *Id.* at 167.

²⁸ *Id.* at 167-68.

²⁹ 443 U.S. 111 (1979).

³⁰ *Id.* at 114.

³¹ *Id.*

³² *Id.* at 118. In support of this assertion, Proxmire argued that Hutchinson had ready access to the media in order to rebut the charges and that he had already received media attention as a result of receiving federal funding. *Id.* at 134. These two factors — access to the media and voluntary exposure to risk of defamation — have undergirded the Supreme Court's protection of speech concerning public figures. See *Gertz*, 418 U.S. at 344. In *Hutchinson*, however, the Court found the presence of neither of these factors. First, Hutchinson's access to the media prior to receiving the award was limited to scientific publications. Second, access to the media resulting from the controversy was not the type of media access contemplated by *Gertz* and its progeny. *Hutchinson*, 443 U.S. at 135. Thus, the plaintiff had not thrust himself into a controversy in order to influence its resolution. *Id.*

who received or benefited from the myriad public grants for research could be classified as a public figure — a conclusion that our previous opinions have rejected.³³

In summary, a person is a "public official" if he or she holds a government office with substantial control of or responsibility for the conduct of governmental affairs. This does not include all government offices; the public must have an interest in the "official's" qualifications or performance greater than the interest the general public has in all government employees. A person may become a "public figure" by either attaining such a status that the person is a public figure for all purposes or by thrusting himself into a particular controversy in order to influence its resolution. Under the federal law, very rarely, if ever, will a person become a limited purpose public figure involuntarily.

II. THE EVOLUTION OF THE "VORTEX PUBLIC FIGURE" IN MISSISSIPPI

Early Mississippi common law viewed defamation as a tort of strict liability,³⁴ the only defenses being truth³⁵ and privilege.³⁶ One privilege was the "fair comment" privilege which was enunciated in *Edmonds v. Delta Democrats Publishing Co.*³⁷ The plaintiff in *Edmonds*, who was head of a temperance organization, alleged that the defendant published an editorial implying that the plaintiff had purposefully misstated the effect of a state-wide referendum which would

³³ *Hutchinson*, 443 U.S. at 135.

³⁴ See *Binns v. Stokes*, 27 Miss. 239, 243 (1854) (defamatory statements presumed to be published with malice). Malice was defined at common law in the sense of ill will or spite. *Scott-Burr Stores Corp. v. Edgar*, 181 Miss. 486, 503-04, 177 So. 766, 770 (1938). See generally W. PROSSER & W. KEATON, *supra* note 7, § 112 (discussion of libel and slander).

³⁵ See *Bass v. Burnett*, 151 Miss. 852, 859, 119 So. 827, 828 (1929) (truth was complete defense to defamation action). Section 13 of the Mississippi Constitution provides a defense to charges of criminal libel when the jury finds that the statement was "true, and was published with good motives and for justifiable ends. . . ." MISS. CONST. art. III, § 13; see also MISS. CODE ANN. § 97-3-57 (1972) (defense of truth requires good motives and justifiable ends). The Mississippi Supreme Court has interpreted § 13 of the Mississippi Constitution as requiring only "substantial truth." See *Smith v. Byrd*, 225 Miss. 331, 344, 83 So. 2d 172, 175 (1955).

³⁶ See *Krebs v. McNeal*, 222 Miss. 560, 576-77, 76 So. 2d 693, 699 (1955) (statements concerning political matters, public officers and political candidates were qualifiedly privileged and were not actionable absent showing of actual malice). However, "accusations of crime, dishonesty, fraud, corruption, immorality, etc., and imputations of dereliction of duty, favoritism, or misconduct in office," were not privileged. *Id.* at 576, 76 So. 2d at 699.

³⁷ 230 Miss. 583, 93 So. 2d 171 (1957).

give each county the option to legalize liquor.³⁸ The court recognized that "[w]hen a person comes prominently forward in any way and becomes a public or quasi-public figure, he invites free expression of public opinion, including criticism."³⁹ The court ruled that statements concerning public or quasi-public officials were qualifiedly privileged provided (1) they related to a matter of public interest, (2) they related to "public assertions or acts" as opposed to an individual's "private affairs," (3) they were in opinion form, and (4) the reader could understand the factual basis of the opinion.⁴⁰ Viewing the evidence, the court found that since the plaintiff was a quasi-public figure and since the privilege had not been abused, the plaintiff had failed to state a cause of action.⁴¹

With *Edmonds*, the fair comment doctrine was firmly established in Mississippi. The next major development in this area came in *Reaves v. Foster*⁴² in which the Mississippi Supreme Court discussed the relationship between the fair comment doctrine and the first amendment protections established in *New York Times Co. v. Sullivan*,⁴³ the landmark United States Supreme Court decision in which the Court held that public officials must prove knowledge of falsity or reckless disregard for truth in order to recover in defamation actions.⁴⁴ In *Reaves*, the defendants were members of a group which was critical of the management of a local attendance center. They published a pamphlet entitled "The Freedom Train" in which there appeared certain cartoons. These cartoons depicted the school's principal as a dog jumping through the school superintendent's hoop, referred to the principal as "Uncle Tom," and referred to the superintendent as "Mister Dictator."⁴⁵ The plaintiffs filed suit alleging that the cartoons were libelous, and the judge sitting without a jury returned a verdict in favor of the plaintiffs in the amount of \$60,000.⁴⁶ On appeal, the Mississippi Supreme Court found that the cartoons were protected by the fair comment privilege and that because the plaintiffs failed to prove

³⁸ *Id.* at 589, 93 So. 2d at 173.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 592, 93 So. 2d at 174. The court stated that this fair comment privilege is abused when there is "malice in the sense of spite, ill will, or culpable recklessness or negligence." *Id.* at 591, 93 So. 2d at 174.

⁴² 200 So. 2d 453 (Miss. 1967)(en banc).

⁴³ 376 U.S. 254 (1964); see *supra* text accompanying note 8.

⁴⁴ *New York Times*, 376 U.S. at 280-81.

⁴⁵ *Reaves*, 200 So. 2d at 454.

⁴⁶ *Id.*

malice their cause of action failed.⁴⁷ The court also found that the plaintiffs had failed to satisfy the burden imposed by the first and fourteenth amendments to the United States Constitution.⁴⁸ According to the court, these amendments require that, where the plaintiff is a public official or is "engaged in activity relative to matters of public interest, public issues, or concern . . .," he must prove the defendant published the statements with "knowledge of their falsity or in reckless disregard as to whether they were true or false."⁴⁹ Because the plaintiffs failed to meet this burden the trial court judgment was reversed.⁵⁰

Although the *Reaves* court stated that the federal courts had "pre-empted the field of libel and slander,"⁵¹ it was apparent that maintenance of a defamation action was contingent upon proving the elements required under Mississippi law as well as those required under federal law. Arguably it was becoming apparent, at least in hind-sight, that the Mississippi Supreme Court was becoming a protector of freedom of speech and of the press. During the late 1960's and 1970's, in addition to school principals, the court found that city policemen and state highway patrolmen were public or quasi-public officials.⁵² The Mississippi court also found that, where a public official or figure retreats into private life, he remains a public figure as to comment con-

⁴⁷ *Id.* at 456. Relying on *Edmonds*, the court noted that where remarks are qualifiedly privileged malice is not presumed but must be proven. The plaintiffs failed to meet this burden. *Id.*

⁴⁸ *Id.* at 456-59.

⁴⁹ *Id.* at 458. The court traced the development of the *New York Times* standard. It noted that in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court held a Louisiana criminal libel statute to be unconstitutional in that it allowed conviction based solely on ill will, spite or hatred. The statute did not require proof of "actual malice" as defined in *New York Times v. Sullivan*, 376 U.S. 251 (1964). *Reaves*, 200 So. 2d at 457.

The Mississippi court stated that "the courts have inferentially and actually extended the *New York Times v. Sullivan* rule to anybody engaged in activity relative to matters of public interest, public issues, or concern, particularly if connected with government." *Id.* at 458. For this proposition, the Mississippi court relied upon *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Pauling v. Globe Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966); and *Walter v. Courier Journal*, 368 F.2d 189 (6th Cir. 1966). In 1971, the United States Supreme Court specifically adopted a "public interest" test. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971) (*New York Times* standard applied to matters of public interest). However, this test was abandoned in *Gertz v. Robert & John Dale, Inc.*, 418 U.S. 423 (1974). *But cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2945 (1985) (private plaintiff involved in private matter not required to prove actual malice in order to recover presumed and punitive damages).

⁵⁰ *Reaves*, 200 So. 2d at 459.

⁵¹ *Id.* at 458.

⁵² See *supra* notes 11-12 and accompanying text.

cerning his past public conduct.⁵³ However, it is important to note that the fair comment privilege protected only statements of opinion. It did not protect statements of facts.

III. FERGUSON V. WATKINS

This trend culminated in the recent case of *Ferguson v. Watkins*⁵⁴ in which the court extended Mississippi's protection of allegedly defamatory comments beyond the protection afforded by the United States Supreme Court. In *Ferguson*, the plaintiffs, three doctors, brought a libel action against the defendants, an editorialist and the North Mississippi Times. The plaintiff doctors operated the emergency room at the Marshall County Hospital as well as an adjacent publicly-funded clinic. From their work at the hospital and the clinic, they received substantial county and federal funding.⁵⁵ The plaintiffs became involved in a conflict with the recently hired hospital administrator, and, eventually, they issued a "him or us" ultimatum to the hospital Board of Trustees. The hospital administrator was discharged prompting the defendants to publish an editorial which became the subject of the doctors' libel action.⁵⁶ The editorial at issue was eleven paragraphs long, only two of which referred to the plaintiffs. According to the editorial, the plaintiffs' arrangement with the hospital was "very lucrative"; they "wanted to get rid" of the hospital administrator in order to keep him from "tear[ing] up . . . [their] little playhouse. . . ."⁵⁷

The jury returned a verdict in favor of the plaintiffs awarding compensatory damages. On motion of the defendants, the trial judge entered a judgment notwithstanding the verdict vacating the jury verdict and awarding the plaintiffs nominal damages only.⁵⁸ On appeal, the Mississippi Supreme Court affirmed, holding that the editorial was not libelous and, in the alternative, that the plaintiffs were "vortex public figures" required to prove actual malice in order to recover.⁵⁹

⁵³ *Newsome v. Henry*, 443 So. 2d 817, 823 (Miss. 1983).

⁵⁴ 448 So. 2d 271 (Miss. 1984).

⁵⁵ *Id.* at 273-74. From their work at the emergency room the three doctors were paid \$135,000 per year. Previously they received approximately \$1,000 in public funds per week for operating the clinic. *Id.* at 273.

⁵⁶ *Id.*

⁵⁷ *Id.* at 273-74, 281. The rest of the editorial criticized the hospital generally. It concluded by implying that the county Board of Supervisors, under the control of a few powerful individuals, had mismanaged the hospital, and urged citizens to demand an investigation. *Id.*

⁵⁸ *Id.* at 274.

⁵⁹ *Id.* at 273. The court's discussion of whether the editorial was libelous was rou-

The basis for finding that the plaintiffs were vortex public figures was two-pronged. Justice Robertson, writing for the majority, first recognized the importance of a free press in a democratic society. This need is proclaimed in the first amendment to the United States Constitution and in the Mississippi Constitution which declares that "freedom of speech and of the press shall be held sacred."⁶⁰ Secondly, the court held that, as "foreshadowed by the liberal spirit of *Edmonds* and *Reaves*," Mississippi law provided even more protection than provided by the United States Supreme Court in *New York Times* and *Gertz*.⁶¹

The Mississippi court concluded that Mississippi law recognizes a class of persons known as "vortex public figures" who must prove "actual malice" in order to recover in a defamation action.⁶² Defining "vortex public figure," the court stated:

It is enough that the matter is in the public domain. Any person who becomes involved, voluntarily or involuntarily, in any matter of legitimate public interest — and *this certainly includes the method of administration of any program of services financed in whole or in substantial part by public monies* — becomes in that context a vortex public figure who is

time. It applied the rule that statements of opinion are actionable only when they imply the existence of underlying false and defamatory facts. Although caustic, these statements could not be considered libelous. They are exemplary only of the "slings and arrows" of every-day life (not of "outrageous fortune"). In short, "[p]hysicians' skins should be toughened with sterner stuff." *Id.* at 276.

Much ado was made by the parties in their briefs concerning libel per se and libel per quod. Alluding once again to the Bard of Avon, Justice Robertson found that, because the statements were not libelous, the briefs though full of "sound and fury" signified nothing. *See id.* at 276 n.3. Unfortunately, our inquiry is limited to libel law; our literary analysis must end here.

⁶⁰ *Id.* at 277; *see* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."); MISS. CONST. art. III, § 13 (guarantee of freedom of press and of speech).

⁶¹ *Ferguson*, 448 So. 2d at 279. The United States Supreme Court recognized in *New York Times* and *Gertz* that traditional libel law conflicted with the first amendment where the libelous statements concerned public officials or public figures. Hence, in such cases, the plaintiff is required to prove actual malice. *See supra* notes 12-26 and accompanying text.

The Mississippi Supreme Court noted that nothing in *New York Times* or *Gertz* required a more restrictive definition of "vortex public figure." *Ferguson*, 448 So. 2d at 279.

⁶² *Ferguson*, 448 So. 2d at 279. The court acknowledged that "actual malice" was authoritatively defined in *New York Times* as knowledge of falsity or reckless disregard of the truth. *Id.* at 277; *see New York Times*, 376 U.S. at 280 (not requiring proof of actual malice would discourage free criticism of government).

subject to fair comment.⁶³

The court emphasized that it was not necessary for the public interest to arise from a controversy so long as the matter was within the public domain.⁶⁴ Because the plaintiff-doctors were in charge of an emergency room and clinic which were funded in substantial part by public monies, the court held them to be vortex public figures. As such, because they failed to prove actual malice their action failed.⁶⁵

Whereas the fair comment privilege applied only to matters of opinion, the *Ferguson* rule applies to commentary, opinion and statements of fact.⁶⁶ Whereas the United States Supreme Court imposes the "actual malice" standard to limited purpose public figures only when they have thrust themselves into a public controversy, *Ferguson* requires only that the matter be of legitimate public interest.⁶⁷ Clearly, the Mississippi Supreme Court has assumed a much stronger stance in the protection of freedom of the press and speech than has the United States Supreme Court. Clearly, *Ferguson* subsumes the greater part of both the fair comment privilege and *Gertz* and its progeny.

IV. FEDERAL LAW REVISITED: *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*

The path of the United States Supreme Court back toward protection of an individual's reputation is apparent in the recent case of *Dun*

⁶³ *Ferguson*, 448 So. 2d at 278 (emphasis added). Compare *id. with Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)(plaintiff was not public figure by reason of administration of public funds). See *supra* notes 22-26 and accompanying text.

⁶⁴ *Ferguson*, 448 So. 2d at 279. Nevertheless, the court further noted that the hospital administrator was the center of a controversy. Hence, even if the plaintiffs had not been public figures before, they became vortex public figures upon issuance of their "him-or-us" ultimatum. *Id.* In dictum, the majority stated that the doctors were not vortex public figures merely because they were doctors. Rather, they achieved this status upon entering a controversy relating to their public employment. *Id.* at 279 n.9.

In dissent, Justice Bowling, with whom Justices Hawkins and Dan Lee joined, argued that the majority should have ended its discussion with the determination that the statements were not libelous and reversed on the ground of plain error. *Id.* at 282 (Bowling, J., dissenting); see Miss. R. Civ. P. 6(b)(plain error rule). The dissent noted that Justice Robertson ignored *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and destroyed the right of many citizens to redress false and defamatory remarks. *Ferguson*, 448 So. 2d at 285-86. The majority opinion, according to the dissent, should be entitled "Citizens Beware — Especially Doctors!" *Id.* at 282.

⁶⁵ *Ferguson*, 448 So. 2d at 279.

⁶⁶ *Id.* at 278.

⁶⁷ *Id.* at 278-79.

& *Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁶⁸ Although it does not directly affect *Ferguson*, the two cases must be read in conjunction.

In *Dun & Bradstreet*, the defendant, Dun & Bradstreet, issued a report to five of its customers. This report, which was confidential between Dun & Bradstreet and its customers, falsely stated that the plaintiff had filed a voluntary petition in bankruptcy.⁶⁹ Unsatisfied with the defendant's retraction, the plaintiff filed a defamation action in a Vermont state court. Without proof of actual malice, the jury awarded the plaintiff presumed and punitive damages.⁷⁰ On motion of the defendant, the trial judge ordered a new trial. The Vermont Supreme Court reversed the order, holding that the protections announced in *Gertz* were not applicable to nonmedia plaintiffs.⁷¹ On appeal, a plurality of the United States Supreme Court affirmed the Vermont Supreme Court and held that, although *Gertz* is applicable to both media and nonmedia defendants, the first amendment does not require a purely private plaintiff to show "actual malice" to recover presumed and punitive damages when the allegedly defamatory statements are of private concern.⁷²

Gertz held that where the plaintiff is a private individual, actual malice does not have to be proved in order to recover actual damages even though the defamatory remarks were of public concern; however, such a plaintiff could recover presumed or punitive damages only upon proof of actual malice.⁷³ According to *Gertz*, the actual malice standard did not apply when the statements were merely of public interest. To become a public figure the person must have thrust himself into a controversy in order to influence the resolution of its issues.⁷⁴ *Gertz* also held that every plaintiff in a libel action must prove at least some fault on the part of the defendant before recovery could be had.⁷⁵

The *Dun & Bradstreet* plurality distinguished *Gertz* on the basis that the statements made by Dun & Bradstreet were not of public concern.⁷⁶ Thus, the Court held the state's interest in protecting the indi-

⁶⁸ 105 S. Ct. 2939 (1985).

⁶⁹ *Id.* at 2941. In fact, an employee of the plaintiff had filed for bankruptcy. *Id.* at 2941-42.

⁷⁰ *Id.* at 2942. The total award was \$350,000. *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2948.

⁷³ See *Gertz*, 418 U.S. at 347-50.

⁷⁴ *Id.* at 345. Alternatively, a person can become a public figure by becoming so prominent that they are a public figure for all purposes. *Id.*

⁷⁵ *Id.* at 347.

⁷⁶ *Dun & Bradstreet*, 105 S. Ct. at 2944.

vidual's reputation outweighed the first amendment's interest in protecting free speech.⁷⁷ As a result, the plaintiff would not be required to prove actual malice in order to recover presumed and punitive damages.⁷⁸

The plurality opinion did not discuss whether the plaintiff would be required to prove some fault on the part of the defendant. However, Justice White in concurrence concluded that "it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable here."⁷⁹ More startling were the conclusions of Justice White and Chief Justice Burger that *New York Times* and *Gertz* should perhaps be overruled as to all circumstances. Said Justice White:

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. . . . [T]hese seem grossly perverse results.⁸⁰

The Supreme Court's once firm stand on freedom of speech seems to be weakening.⁸¹

V. REMAINING ISSUES: *Ferguson* versus *Dun & Bradstreet*

From the preceding material, five classes of libel-slander plaintiffs can be identified. The first two are public officials and public figures. These plaintiffs must prove actual malice under Mississippi and federal law before any recovery may be had. The third class is the *Gertz* private figure involved in a matter of public concern. This plaintiff must prove "some fault" — usually negligence — to recover actual damages, but he must prove actual malice to recover presumed and punitive damages. Next is the *Dun & Bradstreet* private figure involved in a matter of private concern. Under federal law, such a person

⁷⁷ *Id.* at 2945. The Court recognized that not all speech was protected by the first amendment. It further noted proof of actual damages is often impossible. *Id.* at 2946.

⁷⁸ *Id.* at 2948.

⁷⁹ *Id.* at 2953 (White, J., concurring).

⁸⁰ *Id.* at 2951; *see id.* at 2948 (Burger, C.J., concurring).

⁸¹ *But see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984) (courts of appeals have duty to independently review factual findings to determine if actual malice has been proven by clear and convincing evidence).

may recover presumed and punitive damages without proof of actual malice. It is uncertain at present whether a showing of negligence is required. It is also uncertain whether such a class exists under Mississippi law. Finally there is Mississippi's vortex public figure.⁸² As to this creature, certain niceties must be further examined.

The Mississippi Supreme Court emphasized that its decision in *Ferguson* was part of the "positive law" of Mississippi and not an application of federal constitutional law.⁸³ As such, future application of *Ferguson* is in no way restricted by the United States Supreme Court's holding in *Dun & Bradstreet*. As discussed above, *Dun & Bradstreet* relaxes the requirements imposed upon private individuals in defamation actions. *Ferguson* does not address these issues; therefore, whether the Mississippi court will adopt the approach in *Dun & Bradstreet* is undecided. Several points merit further discussion: (a) whether Mississippi law will allow a private individual to recover presumed and punitive damages absent proof of actual malice where the defamatory remarks are not of public concern; (b) whether Mississippi will adhere to the *Gertz* rule that all plaintiffs must prove at least some fault on the part of the defendant; (c) whether the *Ferguson* court has adopted a new definition of "actual malice"; and (d) the logical limits to application of the vortex public figure.

A. Recovery of Presumed and Punitive Damages in Mississippi

Traditionally, all libel was actionable per se. General and punitive damages were presumed and proof of malice was not necessary. Nor did special damages have to be proved.⁸⁴ In slander actions, with cer-

⁸² It can be argued that the *Ferguson* "vortex public figure" is simply an application of the *Rosenbloom v. Metromedia* issue approach. See *supra* note 21. This view is not without foundation. However, as a practical matter, the label attached does not affect the plaintiff's burden. Therefore, for ease of classification, I have labeled the *Ferguson* "doctrine" as a class of plaintiffs, focusing on the person rather than the issue, recognizing, however, that the content of the publication is partially determinative of the application of the *Ferguson* "doctrine." That is, if the plaintiff has become involved in a matter of legitimate public interest, then proof of actual malice is required. I prefer the label "class of plaintiffs" because the vortex public figure must be *involved*, though perhaps involuntarily, in the matter. For a good discussion of the distinction between the "issue approach" and the "person approach," see Comment, *Adjusting the Defamation Standard*, 46 Miss. L.J. 279, 289-92 (1975).

⁸³ *Ferguson*, 448 So. 2d at 279.

⁸⁴ See *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1245-46 (5th Cir. 1980) (Mississippi law does not recognize libel per se/libel per quod distinction; all libel is actionable per se, and malice and damages are presumed), *cert. denied*, 452 U.S. 962 (1982); *Natchez Times Publishing Co. v. Dunigan*, 221 Miss. 320, 326-27, 72 So. 2d 681,

tain exceptions, special damages had to be proved,⁸⁵ but proof of "express malice" was necessary only when rebutting a claimed privilege.⁸⁶ After *Gertz* it appeared that to recover presumed or punitive damages even private plaintiffs were required to prove actual malice. Absent a showing of actual malice, recovery was limited to compensation for "actual injury."⁸⁷ *Dun & Bradstreet* altered this rule as to statements about private plaintiffs not of public interest; in such case presumed and punitive damages are recoverable absent proof of actual malice.⁸⁸

The question arises: Will Mississippi adopt the *Dun & Bradstreet* approach or will she continue to adhere to the *Gertz* standard for private plaintiffs even regarding statements of a purely private concern? There is no clear answer. However, *Ferguson* clearly showed that the Mississippi Constitution would protect freedom of the press and of speech to a greater extent than does the first amendment. The Mississippi Constitution declares these freedoms to be "sacred." It would be consistent with *Ferguson* for the Mississippi court to reject *Dun &*

684-85 (1954)(law presumes damages where words are written; malicious intent not necessary where words are libelous per se); *Conroy v. Breland*, 185 Miss. 787, 797, 189 So. 814, 815 (1939)(at common law written words defamatory in nature were actionable per se without proof of special damages); cf. *Ferguson*, 448 So. 2d at 275 (all defamatory written or printed language is actionable per se).

The term general damages refers to those types of damages assumed to flow from injury to reputation. Special damages are those requiring specific proof, such as pecuniary or material losses. W. PROSSER & W. KEATON, *supra* note 7, § 116A.

⁸⁵ W. PROSSER & W. KEATON, *supra* note 7, § 112. These exceptions were imputation of criminal activity, imputation of loathsome disease, statements regarding a person's profession or calling and accusation of sexual misconduct or unchastity. *Id.*; see *Travis v. Hunt*, 224 Miss. 193, 196, 79 So. 2d 734, 735 (1955)(accusation of larceny was slander per se not requiring proof of general damages); *Taylor v. Standard Oil Co.*, 184 Miss. 392, 399, 186 So. 294, 295 (1939)(words imputing crime, contagious disease or improper business conduct were actionable per se); *Interstate Co. v. Garnett*, 154 Miss. 325, 347-48, 122 So. 373, 378-79 (1929)(imputation of unchastity was actionable per se; word "bitch" could imply unchastity when addressed to white woman who was talking to black man). For a good discussion of damages in defamation actions see Note, *Torts — Defamation — Retreat into Private Life Does Not Remove Plaintiff's 'Public Figure' Status with Regard to Statements About Past Public Conduct*, 54 Miss. L.J. 189, 203-04 n.79 (1984).

⁸⁶ See *Scott-Burr Stores Corp. v. Edgar*, 181 Miss. 486, 503, 177 So. 766, 770 (1938)(actual or express malice required to rebut qualifiedly privileged remarks). "Actual or express malice" in this sense denotes ill will or spite. *Id.*; see also W. PROSSER & W. KEATON, *supra* note 7, § 115 (privilege is abused when exercised in unreasonable manner or for improper purpose).

⁸⁷ *Gertz*, 418 U.S. at 350. However, "actual injury" included more than out-of-pocket losses. It covered damage to reputation or community standing, personal humiliation, and mental pain and suffering. *Id.*

⁸⁸ *Dun & Bradstreet*, 105 S. Ct. at 2948.

Bradstreet and continue to require all plaintiffs to prove actual malice in order to recover presumed and punitive damages. Nothing in *Dun & Bradstreet*, nor any other Supreme Court decision, prohibits such a rule; there is no constitutional right to an unsoiled reputation. On the other hand, the reasoning of *Dun & Bradstreet* is not unsound. When the speech relates to a purely private matter and the plaintiff is a private individual, the state has a "strong and legitimate" interest in protecting the individual's reputation.⁸⁹ Nevertheless, the Mississippi Supreme Court is free to do as it wishes; any prediction would be no more than conjecture.

B. "Fault" Requirement in Mississippi

Prior to *Dun & Bradstreet*, it seemed clear that the first amendment required all libel plaintiffs to prove at least some kind of fault on the part of the defendant.⁹⁰ This generally meant the plaintiff must prove negligence.⁹¹ However, the plurality opinion in *Dun & Bradstreet* left open the possibility that a private plaintiff could recover for defamatory remarks not involving the public interest absent proof of negligence. According to Justice White's concurrence, proof of negligence was not necessary.⁹²

Assuming *Dun & Bradstreet* is interpreted as Justice White believes it should be, will Mississippi follow suit? Probably not. Although the Mississippi court has not specifically addressed this issue, in *Ferguson* it clearly established itself as a protector of free speech and free press. Regardless of the stance taken by the United States Supreme Court, it may be fairly assumed that Mississippi will continue to require proof of some kind of fault in all defamation actions.

C. The Ferguson Definition of Actual Malice

Justice Robertson, in *Ferguson*, recognized that *New York Times v. Sullivan* authoritatively defined "actual malice" as "knowledge of . . . falsity or reckless disregard of whether [the statements] . . . are

⁸⁹ *Id.* at 2945 (quoting *Gertz*, 418 U.S. at 348).

⁹⁰ See *Gertz*, 418 U.S. at 347 (states may determine appropriate standard of liability provided it is not no-fault liability).

⁹¹ See, e.g., *Jones v. District VIII Planning Council*, 492 F. Supp. 143, 147 (D. Minn. 1980) (to recover for defamation, plaintiff must prove fault amounting to at least negligence); *Jenoff v. Hearst Corp.*, 453 F. Supp. 541, 547 (D. Md. 1978) (same).

⁹² See *Dun & Bradstreet*, 105 S. Ct. at 2953 (White, J., concurring) ("it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this").

true or false.”⁹³ However, when explaining what would be the new Mississippi rule he added language foreign to any recognized definition of actual malice. Specifically, he stated the privilege given statements regarding public or vortex public figures is abused when the defendant:

(a) knew clearly that the utterance was false, *defamatory and otherwise actionable*, or

(b) acted in reckless disregard of whether it was false, *defamatory and otherwise actionable*.⁹⁴

The words “defamatory and otherwise actionable” cannot be found in any other United States or Mississippi Supreme Court decisions defining “actual malice.”⁹⁵ If they are treated as anything more than mere surplusage, “actual malice” has a new definition in Mississippi. However, as will be seen, the best conclusion is that they are mere surplusage.

At the outset, it should be noted that Justice Robertson phrases this “new definition” in the conjunctive. The plaintiff must prove that

⁹³ See *Ferguson*, 448 So. 2d at 278.

⁹⁴ *Id.* at 279 (emphasis added).

⁹⁵ See *Dun & Bradstreet*, 105 S. Ct. at 2943 (1985)(actual malice means knowledge of falsity or reckless disregard of whether true or false); *Wolston*, 443 U.S. at 160 (1979)(same); *Firestone*, 424 U.S. at 453 n.2 (1976)(same); *Gertz*, 418 U.S. at 328 (1974)(same); *St. Amant v. Thompson*, 390 U.S. 727, 731-33 (1968)(same; failure to investigate is not bad faith per se); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967)(recovery in libel action involving government official limited to where plaintiff proved “calculated falsehood,” i.e., deliberate falsification or reckless publication with awareness of probable falsity); *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964)(actual malice defined as knowledge of falsity or reckless disregard for truth; reckless disregard for truth defined as “high degree of knowledge of . . . probable falsity”); *New York Times*, 376 U.S. at 280 (1964)(“actual malice” means “with knowledge that it was false or with reckless disregard of whether it was false or not”); *Newsom v. Henry*, 443 So. 2d 817, 821 (Miss. 1984)(plaintiff who is public official or public figure must prove actual malice by clear and convincing evidence; “actual malice” means knowledge that publication was false or reckless disregard of whether it was false); *Gulf Publishing Co. v. Lee*, 434 So. 2d 687, 696 (Miss. 1983)(malice defined as knowledge of falsity or reckless disregard of truth; “reckless disregard of the truth” means “serious doubts” as to verity); *N.A.A.C.P. v. Moody*, 350 So. 2d 1365, 1369 (Miss. 1977)(plaintiff required to prove “actual malice,” defined as knowledge that statement was false or reckless disregard of whether it was true or false); *Perkins v. Mississippi Publishing Corp.*, 241 So. 2d 139, 142-43 (Miss. 1979)(plaintiff required to prove “actual malice or reckless disregard of the truth”); *Pride v. Quitman County Voters League*, 226 So. 2d 735, 757 (Miss. 1969)(“malice” defined as knowledge of falsity or reckless disregard of truth); *Reaves*, 200 So. 2d at 457 (Miss. 1967)(same); *Edmonds*, 230 Miss. at 591, 93 So. 2d at 174 (“malice in the sense of spite or ill will, or culpable recklessness or negligence” was abuse of fair comment doctrine). Nor has my research uncovered any other state court employing this language.

the publication was made with knowledge that it was (or in reckless disregard of whether it was) false, defamatory and otherwise actionable. In other words, in addition to proving traditional "*Times* malice," the plaintiff must satisfy the burden of proving the statements were made with knowledge that they were defamatory and with knowledge that they were otherwise actionable, or that they were made with reckless disregard of both.

The term "defamatory" must be carefully defined. In the larger sense, libel and slander are types of "defamation" actions. In order to make out a prima facie case, the plaintiff must allege and prove, inter alia, falsity of fact. In this sense, knowledge that the words were "defamatory" would infer knowledge that they were false. However, the term "defamatory" is more properly used in a narrower sense as defining an element of a libel or slander cause of action. That is, in a libel or slander action, the plaintiff must allege and prove not only falsity of fact but also that the words were defamatory. In this sense, defamatory generally means injurious to one's reputation.⁹⁸ Using either definition, the plaintiff would be required to prove that the defendant knew that the statements were false and knew that they were injurious to the plaintiff's reputation, a burden heavier than traditional "*Times*" malice.

The Mississippi court's use of the phrase "otherwise actionable" is similarly confusing. If read literally, a plaintiff would have to prove the defendant published his statements with knowledge they were actionable in every way. Since no layperson can be expected to know every nicety of the law of defamation, and since few lawyers, much less reporters, can be expected to know for certain the parameters of the vortex public figure created in *Ferguson*, proving the statements were published with such knowledge would be an almost insurmountable hurdle. Furthermore, whether statements are "otherwise actionable" necessarily depends on whether they were false and defamatory.

The best conclusion is that the court was loose with its pen. The words "defamatory and otherwise actionable" should be dismissed as superfluous surplusage.

D. The Scope of the Vortex Public Figure

Turning finally to the scope of the vortex public figure created in

⁹⁸ See W. PROSSER & W. KEATON, *supra* note 7, § 111 (definition of defamation). The distinction can be seen in *Gertz* where the Court, in the same paragraph, used the phrases "liability for defamation" and "defamatory falsehood." See *Gertz*, 418 U.S. at 327-28.

Ferguson, the limits of this legal creature are, to say the least, uncertain. The *Ferguson* court held unequivocally that a person may become a vortex public figure involuntarily and absent any controversy.⁹⁷ The only requirement is that the allegedly libelous statements relate to a matter of legitimate public interest. The court stated that "this certainly includes the method of administration of any program of services financed in whole or in *substantial part* by public monies."⁹⁸ This definition opens a proverbial "Pandora's Box" of questions: At what level of government funding can it be said a program is financed "in substantial part by public monies"? Does this test apply only to administrators of the program or may a program's beneficiaries, such as welfare or medicaid recipients, be considered vortex public figures? Logically, the answer to the latter question is yes. Welfare and medicaid recipients are involved, though involuntarily, in a matter of legitimate public interest. But do sound policy reasons support holding them to the same standard as public officials?

Closer to home are the good reputations of the members of the bar. No doubt the competence and ethical conduct of the state's lawyers is of legitimate public interest. It can even be said that every attorney voluntarily enters this area of public interest when he chooses to practice law. But is every lawyer a vortex public figure for every purpose? An affirmative answer, although impractical, would not be illogical under *Ferguson*.⁹⁹ The same would be true of other professions such as physicians and accountants.

Traditionally, the determination of whether a plaintiff was required to prove actual malice has depended upon a balancing of the state's interest in protecting the individual's reputation against the constitutional interest in protecting freedom of the press and of speech.¹⁰⁰ Thus, the United States Supreme Court has recognized that the "actual malice" standard represents "an accommodation between [first amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons."¹⁰¹ The Mississippi Constitution's interest in protecting free speech and the press is

⁹⁷ See *Ferguson*, 448 So. 2d at 278.

⁹⁸ *Id.* (emphasis added).

⁹⁹ But cf. *Gertz*, 418 U.S. at 352 (attorney did not become a public figure by involving himself in litigation). Where an attorney is involved in litigation of public interest, the argument that he is a vortex public figure is stronger. However, reading *Ferguson* literally, all attorneys could be vortex public figures regardless of the work in which they are involved.

¹⁰⁰ See *Dun & Bradstreet*, 105 S. Ct. at 2944; *Gertz*, 418 U.S. at 343.

¹⁰¹ See *Dun & Bradstreet*, 105 S. Ct. at 2944 (quoting *Gertz*, 418 U.S. at 343).

no doubt strong. As the majority in *Ferguson* affirmed: "Freedom of the press is a fundamental requisite for the vitality of any democratic society."¹⁰² In order to protect this interest, statements concerning government contractors must be given *New York Times* protection. Over the last several decades the amount of government services performed by private contractors has increased drastically.¹⁰³ No longer is it sufficient to protect only speech concerning public officials and public figures who thrust themselves into controversies. At least to this extent, the vortex public figure rule is beneficial to the operation of our democratic society.

Nevertheless, the state also has a substantial interest in protecting the reputations of private citizens. This interest, the basis for the libel and slander causes of action, has been affirmed by the United States Supreme Court in *Gertz* and *Dun & Bradstreet* as "strong and legitimate."¹⁰⁴ Furthermore, with control of the media becoming more and more concentrated in the hands of a few large corporations,¹⁰⁵ media responsibility becomes more and more important. As Judge Learned Hand said, the first amendment assumes "multiplicity of tongues."¹⁰⁶ But when multiplicity becomes uniformity the justifications of unlimited freedom of the press weaken.

The generally accepted rationale for imposing the actual malice standard upon public figures has been two-fold. First, public figures enjoy greater access to the media in order to rebut false charges. Second, by voluntarily entering the public eye, public figures assume the risk of adverse press.¹⁰⁷ Although logical, this rationale did not carry the day with the Mississippi Supreme Court. Under *Ferguson*, a pri-

¹⁰² *Ferguson*, 448 So. 2d at 277.

¹⁰³ See D. GUTTMAN & B. WILLNER, *THE SHADOW GOVERNMENT* 108-11 (amount government agencies expend on contractors often exceeds amounts spent on government employees).

¹⁰⁴ See *Gertz*, 418 U.S. at 348 (state's interest in protecting reputation of private individual was "strong and legitimate")(quoted in *Dun & Bradstreet*, 105 S. Ct. at 2945).

¹⁰⁵ See *Media Basic Analysis*, Standard & Poors Indus. Surveys § 2 (Aug. 29, 1985). By the end of 1984, 155 groups controlled 1,169 daily newspapers in the United States. Groups controlled 68.3% of the nation's daily newspapers and 78.0% of the daily circulation. These figures were up from 1983 when groups controlled 67.7% and 77.4%, respectively. *Id.* at 36. In the television market, takeovers have been the order of the day. According to analysts, this trend is likely to continue into the foreseeable future. "When the dust finally settles, there will be fewer, larger and more powerful companies in control of the industry." *Id.* at 21.

¹⁰⁶ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)(cited with approval in *New York Times*, 376 U.S. at 270); see also M. GREEN, *THE OTHER GOVERNMENT — THE UNSEEN POWER OF WASHINGTON LAWYERS* 223 (1978).

¹⁰⁷ See *Gertz*, 418 U.S. at 344-45.

vate individual may become involved in a matter of public interest wholly involuntarily. For example, invalids of the Karen Ann Quinlan type often become objects of the press. Their condition and treatment is of public interest; however, unlike persons receiving public funding, there is no compelling reason to require that they prove actual malice if forced into a libel suit. Such a situation would be in stark contrast to the facts of *Ferguson* where the plaintiffs voluntarily reaped the benefits of a publicly funded program. Neither cure of the invalid nor resolution of public medical problems is facilitated by an unbridled press.

The key to future application of *Ferguson* is recognition that a vortex public figure must be involved in a matter of "legitimate public concern."¹⁰⁸ How will "legitimate" be defined? Hopefully, the court will define it narrowly. The temptation to consider anything "news-worthy" legitimate should be avoided. In the past, the public interest has been defined as "issues related to government activities, the well-being of the community, or issues involving public discussion or participation."¹⁰⁹ *Ferguson* requires only that it be in the "public domain."¹¹⁰ Issues outside the public interest are those matters concerning "intimate details of personal life not reasonably related" to the well-being of the community.¹¹¹ The fact that under *Ferguson* a person may be involuntarily drawn into a matter of public concern makes application of these vague definitions even more difficult.

Ferguson is not necessarily a bad decision, yet it should not be applied even unto its most logical limits. It should be applied with caution and deliberation so as not to deny a remedy for a wrongfully damaged reputation when protection of the speech will be relatively non-beneficial. Among the factors to be considered are whether the plaintiff was benefitting from public funding, the amount of responsibility the plaintiff exercised over a publicly funded program, the degree of voluntariness with which the plaintiff became involved in a matter of public interest, and the likelihood that public debate will be chilled if the plaintiff is allowed to recover without proof of actual malice. In this way an accommodation will be reached between the interests of the Mississippi Constitution and the interest of defamed private individuals.

¹⁰⁸ *Ferguson*, 448 So. 2d at 277-79.

¹⁰⁹ Comment, *supra* note 82, at 290.

¹¹⁰ *Ferguson*, 448 So. 2d at 278.

¹¹¹ Comment, *supra* note 82, at 290 (quoting Comment, *The Invasion of Defamation by Privacy*, 23 STAN. L. REV. 547, 565 (1971)).

VI. CONCLUSION

Currently under the Mississippi Constitution, public officials, public figures and vortex public figures must prove "actual malice" — properly defined as knowledge of falsity or reckless disregard for the truth — in order to recover for defamatory falsehoods. Although the United States Supreme Court in *Dun & Bradstreet* left the issue undecided, the Mississippi court will probably require all plaintiffs to prove some fault, amounting to at least negligence, on the part of the defendant. Under both the Mississippi and United States Constitutions to recover presumed and punitive damages, private plaintiffs must also prove actual malice where the defamatory remarks relate to a matter of public interest. However, in *Dun & Bradstreet*, the United States Supreme Court held that where the plaintiff is a private individual and the statements are not of public concern, actual malice is not necessary to recover presumed and punitive damages. Whether the Mississippi Constitution requires proof of actual malice in such a case is uncertain. Lastly, it must be remembered that unless the words are actionable per se proof of special damages is always required.¹¹²

Future litigation in Mississippi in this area will center upon the scope of the vortex public figure. Extension of this status should be met with caution and deliberation in order to accommodate the competing interests of freedom of speech and the press and of the individual in redressing a tarnished reputation. Meanwhile, careful plaintiffs attorneys should avoid bringing defamation actions in Mississippi if jurisdictionally possible.

George H. Ritter

¹¹² See *supra* notes 85-86 and accompanying text.

RECENT DECISIONS

JURISDICTION—INJUNCTION—KNOWLEDGEABLE PARTICIPATION BY A NONRESIDENT NONPARTY IN A PARTY'S VIOLATION OF A FEDERAL COURT ORDER SUBJECTS THE NONRESIDENT NONPARTY TO THE JURISDICTION OF THE ISSUING COURT

Plaintiffs¹ sought enforcement of a temporary restraining order and a preliminary injunction issued by the United States District Court for the Northern District of Mississippi prohibiting the disbursal or concealment of funds.² In connection with the underlying securities fraud litigation, certain respondents³ knowingly received funds concealed in violation of the court's orders.⁴ Plaintiffs contended that the respondents were bound by, and therefore in contempt of, the court's

¹ Plaintiffs were Friedrich Waffenschmidt and his wife who purchased \$4.5 million of stock in a Mississippi corporation from the defendant MacKay and later sued him for securities fraud. *Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985).

² *Id.* at 714. The temporary restraining order (TRO) and preliminary injunction were issued following the commencement of plaintiffs' underlying suit. *Id.* The TRO was issued on March 16, 1983, to prevent the defendant and all those acting with him from transferring, concealing, or disposing of funds given them by the plaintiffs. *Id.* The preliminary injunction was issued on May 27, 1983. *Id.* The purpose of the injunction was to maintain the interdictions of the TRO and to require the defendant to pay \$430,000 of the stock sale proceeds into court. *Id.*

³ *Id.* at 714. The respondents were Currey, Johnson, Johnson's business D & K Motor Sports, Inc. (hereinafter referred to collectively as Johnson), and the First National Bank of Mount Vernon, Texas (hereinafter the bank), all of whom were residents of Texas and none of whom were parties to the underlying suit. *Id.* at 714-15.

⁴ *Id.* at 714. Defendant MacKay failed to place the sums called for by the preliminary injunction in the custody of the court and was subsequently held in contempt. *Id.* Defendant was unable to comply with the injunction due to his concealment of the funds by transferring them as United States Treasury Notes to the respondents. *Id.* The respondents were subsequently ordered to show cause why they should not be found in contempt of court. *Id.* at 715. The district court determined that both Currey and Johnson had knowledge that they were violating the court's order by aiding the defendant in concealing the money. *Id.* at 715, 724-25. However, the court also determined that the bank was unaware of any existing court order at the time of its actions even though it was negligent in dealing with the defendant. *Id.* at 715, 726.

TRO and preliminary injunction.⁵ Respondents claimed to be outside the jurisdiction of the district court and not bound by the decrees of the court.⁶ The district court held for the plaintiffs against all but one of the respondents.⁷ On appeal, the United States Court of Appeals for the Fifth Circuit, *held*, affirmed.⁸ In the absence of traditional in personam jurisdiction, where a nonparty, nonresident respondent is aware of the court's orders and knowingly aids the defendant in violating the court's orders, the respondent is within the jurisdiction of the court. *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985).

Historically, courts considered the propriety of rendering an in personam⁹ judgment against a nonresident in light of the principle of justice requiring that one have notice of a suit before being bound by its result.¹⁰ Following the passage of the fourteenth amendment to the

⁵ *Id.* at 714-15. Plaintiffs maintained that the nature of the respondents' actions brought them within the jurisdiction of the court and thus subjected them to the orders of the court. *Id.*

⁶ *Id.* at 715. Respondents conceded the district court's power to issue the TRO and preliminary injunction. *Id.* at 716. Respondents claimed, however, that since the court lacked general in personam jurisdiction over them, they were not bound by the court's orders. *Id.* at 716-17.

⁷ *Id.* at 715. The district court conceded that it lacked traditional in personam jurisdiction over the respondents. *Id.* However, the court held that respondents Currey and Johnson were within its jurisdiction with regard to the TRO and preliminary injunction because they knowingly aided the defendant in violating the orders. *Id.* Accordingly, the court found respondents Currey and Johnson in contempt. *Id.* The court held the bank to be outside its jurisdiction because the bank did not willfully aid the defendant in violating the TRO and injunction. *Id.*; see *supra* note 4 and accompanying text. The district court relied upon FED. R. Civ. P. 65(d) which provides that court orders are binding upon the parties to the action and upon those acting in concert with such parties who receive knowledge of the orders. *Waffenschmidt*, 763 F.2d at 715.

⁸ *Waffenschmidt*, 763 F.2d at 727. The court of appeals did not base its decision on the district court's interpretation of FED. R. Civ. P. 65(d). *Waffenschmidt*, 763 F.2d at 719. Instead, the court based its finding of jurisdiction upon the inherent powers of all courts to enforce their injunctive decrees and upon an analysis of courts' powers to assert personal jurisdiction over nonresidents. *Id.* at 716-17, 720.

⁹ See *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316 (1870)(in personam jurisdiction is power of court over parties); *Collins v. Powell*, 224 Iowa 1015, 1020, 277 N.W. 477, 481 (1938)(in personam jurisdiction defined as authority to subject parties to decisions and rulings of court).

¹⁰ See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1855)(assertion of personal jurisdiction over nonresident not allowed to violate aspects of natural justice requiring notice of suit); *The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815)(natural justice dictates that before individual can be bound, he must have notice of proceedings against him); see also *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813)(Johnson, J., dissenting)(one indispensable principle is that states cannot bind those outside their jurisdiction).

United States Constitution,¹¹ such questions were examined in terms of whether the exercise of jurisdiction constituted due process of law.¹² Consequently, the due process clause functioned as a limitation upon a court's ability to acquire personal jurisdiction over a nonresident.¹³ In *Pennoyer v. Neff*,¹⁴ the Supreme Court of the United States considered the issue of whether a state court could exercise personal jurisdiction over a nonresident.¹⁵ The Court found that the assertion of personal jurisdiction over the plaintiff violated the fourteenth amendment due process clause because the plaintiff was not served with process inside the forum state and did not submit to jurisdiction voluntarily.¹⁶ Following *Pennoyer*, these strict grounds of presence within the forum or voluntary submission to jurisdiction as criteria for due process formed the basis of the law of personal jurisdiction.¹⁷

¹¹ U. S. CONST. amend. XIV, § 1. The fourteenth amendment provides in pertinent part that "No state . . . shall . . . deprive any person of life, liberty, or property without due process of law. . . ." *Id.*

¹² See *New Orleans Water Works v. New Orleans*, 164 U.S. 471, 480 (1896)(validity of adjudication without personal jurisdiction measured by due process criteria); see also *Scott v. McNeal*, 154 U.S. 34, 45-46 (1893)(decree of any court rendered without jurisdiction or notice to party fails to satisfy due process); Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 917 (1960)(jurisdiction claims based upon whether due process was satisfied).

¹³ See *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 23 (1907)(assertion of jurisdiction over nonresident corporation held void under fourteenth amendment); *Haddock v. Haddock*, 201 U.S. 562, 567 (1906)(judgment against nonresident void under due process clause where rendered without personal service of process); see also Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, U. ILL. L.F. 533, 533 (1963)(after adoption of fourteenth amendment, courts held due process clause to be limitation on states' powers of personal jurisdiction).

¹⁴ 95 U.S. 714 (1877). The Supreme Court subsequently overruled *Pennoyer* in *Shaffer v. Heitner*, 433 U.S. 186 (1977); see *infra* note 37.

¹⁵ *Pennoyer*, 95 U.S. at 733. The plaintiff sought to have a judgment rendered against him in Oregon overturned for lack of personal jurisdiction. *Id.* at 716. Plaintiff was a nonresident of Oregon and was not afforded personal service of process. *Id.* at 719-20. A default judgment was entered against the plaintiff based upon service by publication of the summons. *Id.* at 720.

¹⁶ *Id.* at 733. The Court reasoned that proceedings which attempted to determine the rights and duties of persons not within the jurisdiction of the tribunal failed to satisfy due process of law. *Id.* The Court further reasoned that because of the sovereignty of each individual state, process from the courts in one state could not compel residents of other states to appear in that forum. *Id.* at 727; see also *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1855)(rules of public law protected residents of one state from submission to jurisdiction of other states); *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850)(judgments of courts of one state attempting to bind residents of other states were void).

¹⁷ See *Goldey v. Morning News*, 156 U.S. 518, 521 (1894)(where nonresident re-

The United States Supreme Court liberalized the strict rule established in *Pennoyer* by allowing states to exact consent to jurisdiction from nonresident individuals as a prerequisite to using the highways¹⁸ or transacting business within a state.¹⁹ Also, the Court developed methods for the assertion of personal jurisdiction over nonresident corporations by inferring "presence" within a state²⁰ or implying "consent" to jurisdiction by virtue of a corporation's carrying on business within the forum state.²¹ Subsequently, in *International Shoe Co. v. Washington*,²² the Supreme Court announced a new test for personal

ceived no service of notice within state and did not voluntarily appear, no jurisdiction attached); *Wilson v. Seligman*, 144 U.S. 41, 43 (1891)(assertion of jurisdiction held void where nonresident received no notice while present in state and did not voluntarily appear); *Freeman v. Alderson*, 119 U.S. 185, 188 (1886)(same).

¹⁸ See, e.g. *Wuchter v. Pizzutti*, 276 U.S. 13, 19 (1928)(nonresident using highways of state deemed to have agreed to accept service of process); see also *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927)(state allowed to consider nonresident's use of highways as equivalent to acceptance of service of process in state); *Kane v. New Jersey*, 242 U.S. 160, 167 (1916)(state could require nonresident to appoint agent for service of process in connection with highway regulation); cf. *Young v. Masci*, 289 U.S. 253, 259 (1932)(nonresident bailor of automobile held to be subject to jurisdiction in state where bailee used car). See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272 (subsequent decisions expanded *Pennoyer* doctrine).

¹⁹ See, e.g., *Doherty v. Goodman*, 294 U.S. 623, 627 (1935)(nonresident who received benefit from transactions in state bound by state's process served on his agent in state); cf. *Flexner v. Farson*, 248 U.S. 289, 292-93 (1919)(process served on individual who no longer acted as defendant's agent in state not sufficient to bind defendant).

²⁰ See *Philadelphia & Reading Ry. v. McKibben*, 243 U.S. 264, 265 (1917)(foreign corporations only subject to jurisdiction where activities in state warranted inference of "presence" there); see also *St. Louis Southwestern Ry. v. Alexander*, 227 U.S. 218, 228 (1913)(foreign corporation only amenable to forum state's process if it transacted requisite business there); *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)("presence" in forum required continuous dealings in state by nonresident corporation). See generally Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 573 (1958)(rise of corporate activity required provisions for jurisdiction over foreign corporations).

²¹ See *Mutual Reserve Ass'n v. Phelps*, 190 U.S. 147, 158-59 (1903)(state was allowed to imply consent to jurisdiction by foreign corporation doing business in state); *Connecticut Mut. Life Ins. Co. v. Sprately*, 172 U.S. 602, 618 (1899)(foreign corporation doing business in state held to have impliedly consented to jurisdiction); see also *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 150-51 (S.D.N.Y. 1915)(no constitutional problems associated with state requiring "consent" to jurisdiction by foreign corporation as condition to operating in state); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915, 917-18 (1917)(required nonresident defendant to be within state's jurisdiction in order to transact business in state).

²² 326 U.S. 310 (1945).

jurisdiction over nonresidents.²³ The Court held that the appellant, a Delaware corporation operating in Washington, was within the jurisdiction of courts in the state of Washington.²⁴ The Court stated as the basis of its decision that, if due process were to be satisfied, a defendant need only have certain "minimum contacts" with the forum.²⁵ Further, the Court stated that the sufficiency of these contacts would be measured by whether subjecting the defendant to personal jurisdiction in a foreign state would "offend traditional notions of fair play and substantial justice."²⁶ *International Shoe* became the landmark case in the area of in personam jurisdiction²⁷ over nonresident corporations

²³ *International Shoe*, 326 U.S. at 316. See *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 380 (6th Cir. 1968)(court noted that Supreme Court broke with past, enunciated new test in *International Shoe*).

²⁴ *International Shoe*, 326 U.S. at 321. The appellant maintained its principal place of operation in St. Louis, Missouri but also carried on business in other states. *Id.* at 313. While appellant did not operate an office in Washington, several salesmen under the supervision of the St. Louis office performed their principal activities and resided in the state of Washington. *Id.* The activities of these salesmen consisted of exhibiting shoe samples and taking orders. *Id.* at 314. The state of Washington sought jurisdiction over the appellant to collect unpaid unemployment compensation funds pursuant to a Washington statute. *Id.* at 311.

²⁵ *Id.* at 316. The Court found that considering due process requirements in terms of whether a corporation was "present" in a state failed to properly address the issue. *Id.* The reason, according to the Court, was that the term "presence" was merely symbolic of the authorized activities carried on by the corporate defendant's personnel within a state. *Id.* at 316-17. Such activities, the Court concluded, were the true due process criteria. *Id.*; see also McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331, 335 (1946)("presence" theory discarded); Note, *Constitutional Law—Conflict of Laws—Jurisdiction Over Foreign Corporations*, 7 AL. LAW 223, 226 (1946)(*International Shoe* Court adopted reasoning that "presence" was merely symbolic).

²⁶ *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In addition, the Supreme Court stated that a corporation's connection with a foreign state would be examined in light of whether it was reasonable to compel the corporation to answer a suit in that forum. *International Shoe*, 326 U.S. at 317. Further, the Court reasoned that due process did not allow personal jurisdiction over a corporation with which the state possessed no "contacts, ties, or relations." *Id.* at 319. In this regard, the Court stated that the quality and nature of the corporation's activity would be of paramount importance in determining whether personal jurisdiction could be asserted. *Id.*; see also *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)(substantial justice and fair play are inherent to due process).

²⁷ See, e.g., *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 826 (10th Cir. 1963)(followed *International Shoe* "minimum contacts" doctrine in upholding jurisdiction over foreign corporation); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132, 136 (10th Cir. 1962)(applied "minimum contacts" analysis in libel action); *Shutt v. Commercial Travelers Mut. Accident Ass'n*, 229 F.2d 158, 162 (2d Cir. 1956)(found nonresident corporation to have "minimum contacts" with forum), *cert. denied*, 351 U.S. 940 (1956); *Clover*

and individuals alike.²⁸

In *McGee v. International Life Insurance Co.*,²⁹ the Supreme Court extended the holding in *International Shoe* to include a "contact" with the forum consisting of a single insurance contract.³⁰ The Court found that the insurance contract constituted a connection to the forum substantial enough to warrant the exercise of personal jurisdiction by the California court over the respondent.³¹ The *McGee* Court based its finding on the vital interest of the state of California in allowing its residents an avenue of local redress when faced with an insurer's refusal to pay a claim.³² Further, the Court conceded that the insurer would be inconvenienced, but not to the point of making the assertion of jurisdiction violative of due process.³³

Leaf Freight Lines v. Pacific Coast Wholesalers Ass'n, 166 F.2d 626, 631 (7th Cir. 1948)(relied on *International Shoe* to extend jurisdiction), *cert. denied*, 335 U.S. 823 (1948). See generally Note, *Constitutional Law: Process: In Personam Jurisdiction over Foreign Corporations on Basis of One Act in State: McGee v. International Life Insurance Company*, 44 CORNELL L.Q. 117, 119 (1958)(*International Shoe* recognized as leading case in expansion of scope of in personam jurisdiction).

²⁸ See *Owens v. Superior Court*, 52 Cal. 2d 822, 824-25, 345 P.2d 921, 925 (1959)(*International Shoe* applicable to nonresident corporations and individuals); see also Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 559, 603 (1955)(principles of *International Shoe* apply to nonresident corporations and individuals). See generally Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 251 (1959)(discussing *International Shoe* as a blueprint for nonresident jurisdiction in all situations).

²⁹ 355 U.S. 220 (1957).

³⁰ *Id.* at 223. Petitioner received a judgment in California against the respondent, a Texas insurance company. *Id.* at 221. The judgment was rendered pursuant to a California statute allowing service of process on nonresident insurance companies. *Id.* The insurance contract sued upon by petitioner was the sole contact that the respondent had with California. *Id.* at 222. Petitioner sought to collect the judgment in Texas, but the Texas courts dismissed the claim as violative of the fourteenth amendment due process clause. *Id.* at 221.

³¹ *Id.* at 223.

³² *Id.* The Supreme Court observed that California residents would be severely disadvantaged if they had to sue their insurers in distant states and that the pursuit of small claims would become impractical. *Id.*; see also *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)(state regulatory interests justified jurisdiction over nonresident corporation); *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S.2d 418, 425 (1953)(statute authorizing jurisdiction for protection of residents holding policies with foreign insurers upheld); cf. *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)(Virginia had interest in protecting residents, even if protection caused effects outside state; jurisdictional question not involved).

³³ *McGee*, 355 U.S. at 224. Also, it was found that because of modern advances in communication and transportation a party sued in a foreign state could defend himself there without facing a substantial burden. *Id.* at 223.

In *Hanson v. Denckla*,³⁴ however, the Court stated that it was a mistake to assume that the trends established in *International Shoe* and *McGee* marked the end of all restrictions on state courts' powers to assert personal jurisdiction over nonresidents.³⁵ The Court further observed that such restrictions were a consequence of the territorial limits placed upon the power of each state and that jurisdiction was warranted only where the nonresident possessed sufficient "minimum contacts" with the forum.³⁶ As to what contacts were sufficient to support jurisdiction, the Court held that it was essential for a defendant to "purposefully avail" itself of the privilege of doing business within a state.³⁷

³⁴ 357 U.S. 235 (1958).

³⁵ *Id.* at 251; see *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957)(divorce court lacking personal jurisdiction over nonresident wife had no power to terminate husband's duty of support); *Estin v. Estin*, 334 U.S. 541, 548-49 (1948)(divorce court's attempt to bind nonresident wife denied). The *Hanson* Court determined that a Florida court did not have jurisdiction over a Delaware company whose only contact with the forum was its correspondence with an individual who was domiciled in Florida. *Hanson*, 357 U.S. at 252.

³⁶ *Hanson*, 357 U.S. at 251. The *Hanson* decision was reconciled with the *International Shoe* and *McGee* decisions in that the defendant's ties with Florida did not constitute the necessary "minimum contacts" or substantial connection with the forum. *Id.* Such contacts were deemed to be absent because there had been no business transaction consummated or act done within the forum state. *Id.*; see also *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445 (1952)(corporation's continuous and systematic activities in forum rendered it subject to court's jurisdiction); *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 87 (1918)(business must be of such nature as to warrant inference that corporation placed itself within local jurisdiction); *Frene v. Louisville Cement Co.*, 134 F.2d 511, 515 (D.C. Cir. 1943)(mere casual, occasional contact not sufficient for jurisdiction over nonresidents).

³⁷ *Hanson*, 357 U.S. at 253. Whether the contacts requirement was satisfied depended upon the quality and nature of the defendant's activity. *Id.* The Court held that in any case there must be purposeful availment by the nonresident defendant. *Id.*

Subsequent decisions applied and upheld the jurisdictional doctrines established in *International Shoe* and *McGee*, and also the "purposeful availment" rationale announced in *Hanson*. See *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1172 (5th Cir. 1985)(single purposeful act of shipping product into forum state constituted sufficient contact); *Prejean v. Sontrach, Inc.*, 652 F.2d 1260, 1268 (5th Cir. 1981)(nonresident's actions which caused effects in state amounted to sufficient contacts). The *Prejean* court held that when a nonresident defendant's purposeful actions had reasonably foreseeable effects within the forum, then those actions constituted contacts sufficient to warrant the exercise of jurisdiction over the nonresident. *Id.* The court further stated that in all cases the effect must be purposefully created. *Id.*

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980), the Supreme Court applied "minimum contacts" analysis to products liability litigation. The *World-Wide Volkswagen* Court denied jurisdiction of an Oklahoma court over a nonresident corporation because the corporation's only contact with Oklahoma was that a car it

Similar to the finding of personal jurisdiction over nonresidents, courts have been faced with the necessity of asserting personal jurisdiction over nonparties who knowingly violated their orders.³⁸ In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,³⁹ the Supreme Court of the United States held that an injunction issued by a federal court was binding upon those who, with knowledge of the order, aided the defendant in violating the injunction.⁴⁰ However, the Court also stated that such a nonparty could only be held in contempt of an injunction upon a finding of active participation with the defendant in violating the order.⁴¹ In *United States v. Hall*,⁴² the United States Court of Ap-

had sold plaintiff caused the plaintiff injury in that state. *Id.* at 285. The Court stated, however, that where a defendant's actions were such that it could reasonably have foreseen being sued in a certain state, then the defendant would have full notice that it might be required to answer in that forum. *Id.* at 297. Accordingly, the Court reasoned that had the defendant corporation's connection to Oklahoma amounted to more than a single car accident, then that connection might have warranted a finding of jurisdiction. *Id.*; see also *Helicopteros Nacionales de Colom. S.A. v. Hall*, 104 S. Ct. 1868, 1875 (1984)(Court applied "minimum contacts" due process analysis); *Rush v. Savchuk*, 444 U.S. 320, 329 (1980)(defendant's lack of purposeful activity relating to forum constituted absence of grounds to assert jurisdiction); *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1977)(defendant's contacts and state's interest in litigating considered); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)(state-court jurisdiction examined in light of *International Shoe* and progeny). The *Shaffer* Court also overruled the *Pennoyer* decision to the extent that it conflicted with the "minimum contacts" doctrine. *Id.* at 212.

³⁸ See, e.g., *Ex Parte Lennon*, 166 U.S. 548, 554 (1897)(nonparty who acted in knowing violation of court's injunction held to be amenable to injunction). In *Lennon*, the nonparty petitioner knowingly violated an injunction issued by a federal court. *Id.* The Supreme Court stated that in order to render an individual amenable to an injunction, it is only necessary that the person have actual notice of the order even where the individual is not a party to the underlying suit. *Id.*; see also *Garrigan v. United States*, 163 F. 16, 23 (7th Cir. 1908)(no evidence found of knowing attempt to violate injunction, therefore nonparty was not within court's jurisdiction); *Ex Parte Richards*, 117 F. 658, 662 (S.D. W.Va. 1902)(violation of injunction punishable as contempt even where no process had issued at the time of violation); *Conkney Co. v. Russell*, 111 F. 417, 420 (D. Ind. 1901)(court had power to punish nonparties who knowingly aided in violating its order), *appeal dismissed*, 133 F. 165 (7th Cir. 1904).

³⁹ 395 U.S. 100 (1969).

⁴⁰ *Id.* at 112. Rule 65(d) of the Federal Rules of Civil Procedure provides in pertinent part that orders granting injunctions and restraining orders are "... binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." FED. R. CIV. P. 65(d).

⁴¹ *Zenith*, 395 U.S. at 112. Plaintiff in an underlying patent infringement suit, along with its parent company, had been enjoined by a federal district court from the misuse of its patents. *Id.* at 105. The injunction was issued in response to a counterclaim by the defendant. *Id.* The parent corporation was a nonparty to the original suit. *Id.* at 110. The court of appeals set aside the district court's injunction with regard to the parent corpo-

peals for the Fifth Circuit found that a nonparty who knowingly violated a federal district court's injunction⁴³ was properly held in contempt of that order.⁴⁴ The Fifth Circuit stated that where a nonparty's disruptive behavior compromised a court's ability to make a binding judgment, then that court possessed inherent jurisdiction to ensure its ability to enforce its judgment.⁴⁵ The court rested its decision upon its assessment that the activities of the nonparty amounted to willful violation of the district court's order.⁴⁶

ration for lack of personal jurisdiction. *Id.* at 107. In affirming the court of appeals, the Supreme Court held that because there was no finding of "active concert or participation" by the parent company, then it could not be bound by the injunction. *Id.* at 112; see *supra* note 40.

⁴² 472 F.2d 261 (5th Cir. 1972).

⁴³ *Id.* at 264. The injunction was issued in connection with underlying school desegregation litigation. *Id.* at 263. The order prohibited all students of the school in question and those acting with them from disrupting the orderly operation of the school. *Id.* One Eric Hall was not a party to the underlying suit but was served with a copy of the injunction. *Id.* at 263-64. Hall purposefully appeared on the school campus to violate the court's order. *Id.* at 264.

⁴⁴ *Id.* at 264. The court of appeals affirmed the district court's finding that Hall was in contempt because of his willful violation of the injunction. *Id.* at 268.

⁴⁵ *Id.* at 265; see also *United States v. United Mines Workers of America*, 330 U.S. 258, 311 (1947)(district court had power to preserve existing conditions with restraining order); *United States v. Shipp*, 203 U.S. 563, 565 (1906)(power to punish for contempt is inherent to all courts for enforcing judgments); *In Re Debbs*, 158 U.S. 564, 594 (1895)(court's power to render decree is accompanied by power to punish for disobedience of that decree); *Lineker v. Dillon*, 275 F. 460, 470 (N.D. Cal. 1921)(court had power to keep judgment from being violated or obstructed); Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 918 (1975)(enforcement of desegregation orders required broad cooperation; *Hall* court rightfully insured cooperation). But see *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 436-37 (1934)(nonparties who acted in furtherance of independent interests not bound); *Scott v. Donald*, 165 U.S. 107, 117 (1897)(no conspiracy between named parties and nonparties, thus injunction did not bind nonparties); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930)(nonparty violating injunction in furtherance of his own interests not bound).

⁴⁶ *Hall*, 472 F.2d at 267; see *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945)(nonparties acting in privity with defendant to violate injunction are bound). The *Regal Knitwear* Court, in interpreting FED. R. Civ. P. 65(d), held that a defendant could not be allowed to nullify a court's order by acting to violate the decree through nonparty aiders and abettors. *Regal Knitwear*, 324 U.S. at 13-14; see also *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932)(nonparty's knowing violation of injunction prohibiting patent infringement placed it within court's jurisdiction); *Lance v. Plummer*, 353 F.2d 585, 591 (5th Cir. 1965)(nonparty who acted with knowledge and in concert with parties to violate injunction held to be subject to terms of injunction), *cert. denied*, 384 U.S. 929 (1966). In *Lance*, the nonparty appellant violated an injunction prohibiting the parties, and those in active participation with them, from obstructing civil rights laws. *Lance*, 353 F.2d at 587. The Fifth Circuit held that, because the nonparty appellant

In the instant case, the court of appeals reasoned that since courts possessed inherent powers⁴⁷ to bind nonparties who knowingly compromised the effectiveness of their decisions, then the district court had the power to enforce its decrees against the respondents.⁴⁸ Further, the court found that since the purposefulness of the respondents' actions⁴⁹ had caused such extreme effects on the district court's ability to enforce its injunctive decree,⁵⁰ such actions constituted sufficient grounds to justify the assertion of jurisdiction by the district court.⁵¹ Further, the court found that the respondents acted with the defendant to conceal the funds subject to the injunction,⁵² and that these actions constituted sufficient "contacts" with the forum to warrant a finding of jurisdiction.⁵³ Finally, since the district court inherently possessed the power to enforce its TRO and preliminary injunction, and since respondents' knowing and purposeful acts had substantial effects on that court's ability to enforce these decrees, then the respondents were

knowingly acted in concert with the enjoined defendants, such action rendered the appellant subject to the injunction. *Id.* at 591.

⁴⁷ *Waffenschmidt*, 763 F.2d at 716 (citing *United States v. Hall*, 472 F.2d at 267); see *supra* note 45 and accompanying text.

⁴⁸ *Waffenschmidt*, 763 F.2d at 716-17. The court of appeals noted that no authority could be found which specifically addressed the issue of whether the nonresident, non-party respondents could be brought within the district court's jurisdiction given their special circumstances. *Id.*; see *supra* notes 2, 5. Accordingly, the alternative rationales of the inherent authority of the court to act and the "minimum contacts" analysis of *International Shoe* were used to support the finding of jurisdiction. *Waffenschmidt*, 763 F.2d at 716-17.

⁴⁹ *Waffenschmidt*, 763 F.2d at 723. The court of appeals found that the respondents acted purposefully to achieve the result of dissipating funds which they knew to be the subject of existing litigation in Mississippi. *Id.*

⁵⁰ *Id.* The court stated that the respondents' active participation in receiving funds from the defendant substantially impaired the district court's ability to administer justice in general, as well as its ability to properly dispose of the *Waffenschmidt*'s litigation. *Id.*

⁵¹ *Id.* The court of appeals further stated that because the effects of the respondents' actions on the Mississippi forum were foreseeable to them, the nonresident, non-party respondents could not justifiably claim that the district court's assertion of jurisdiction over them was unfair or unreasonable. *Id.* Respondents had alleged that since their actions were not committed in Mississippi, they could not be within the jurisdiction of that forum. *Id.* at 722.

⁵² *Id.* at 722.

⁵³ *Id.* at 723. The court found that because the respondents' actions were purposeful and their effects substantial, then subjecting the respondents to jurisdiction in Mississippi would be proper despite their lack of other contacts with the forum. *Id.* The court of appeals also noted that the district court had a strong interest in asserting jurisdiction because of the need to enforce its injunction. *Id.* at 721-22.

rightfully within the jurisdiction of the district court.⁵⁴

The law is settled that a nonresident who possesses certain "minimum contacts"⁵⁵ or is "substantially connected"⁵⁶ with a state may be subject to personal jurisdiction in that forum.⁵⁷ It is also settled that a court can exercise jurisdiction over those who act in concert with a defendant to violate the orders of the court even where such individuals are not parties to the suit.⁵⁸ The *Waffenschmidt* case is unusual in that it presents a situation where the court was faced with the question of whether or not it should uphold jurisdiction over respondents who were both nonresidents and nonparties.⁵⁹ These special circumstances surrounding the respondents are undoubtedly one of the reasons that the court of appeals did not strictly rely on Rule 65(d) of the Federal Rules of Civil Procedure⁶⁰ as did the district court.⁶¹ The *Waffenschmidt* rule illustrates the point that courts will exert great efforts to obtain jurisdiction over those who willfully defy their orders.⁶²

There is ample justification for this holding because it is obviously imperative to the continued vitality of our judicial system that courts have the power to enforce their judgments.⁶³ Although the boundaries and sovereignty of the states should be respected wherever possible,⁶⁴ considerations of judicial economy and orderly enforcement of court orders dictate the necessity of assertion of personal jurisdiction in cases of this type.⁶⁵ Aside from the possible extension of the "minimum contacts" doctrine to include actions causing foreseeable effects on existing litigation inside the forum,⁶⁶ the *Waffenschmidt* decision is essentially rested upon established law.⁶⁷ It is the special circumstances surrounding the respondents which make the case unique.⁶⁸ In this regard, the *Waffenschmidt* decision will certainly enhance the ability of

⁵⁴ *Id.* at 716, 720 and 723.

⁵⁵ See *supra* notes 25, 27 and accompanying text.

⁵⁶ See *supra* text accompanying note 31.

⁵⁷ See *supra* notes 25-31 and accompanying text.

⁵⁸ See *supra* notes 40-56 and accompanying text.

⁵⁹ *Waffenschmidt*, 763 F.2d at 714.

⁶⁰ See *supra* note 8. For the language of Rule 65(d), see *supra* note 40.

⁶¹ See *supra* note 7.

⁶² See *supra* note 46 and accompanying text.

⁶³ See *supra* note 45 and accompanying text.

⁶⁴ See *supra* notes 35-36 and accompanying text.

⁶⁵ See *supra* note 45 and accompanying text.

⁶⁶ See *supra* notes 50-51 and accompanying text.

⁶⁷ See *supra* notes 37, 40-41 and accompanying text.

⁶⁸ See *supra* note 3.

subsequent courts to assert personal jurisdiction over nonresident, nonparties who knowingly violate their orders.

Walter J. Brand

CONSTITUTIONAL LAW—EIGHTH AMENDMENT—CRUEL AND UNUSUAL
PUNISHMENT—THE PREJUDICIAL EFFECT OF THE PROSECUTOR'S
COMMENT ON THE CAPITAL SENTENCING JURY

Petitioner,¹ who shot and killed a store owner while in the commission of a robbery,² appealed a conviction of capital murder and a death sentence which had been rendered in the Circuit Court of DeSoto County, Mississippi.³ Petitioner alleged that during the course of the trial the prosecutor made comments pertaining to the jury's sentencing role which had a prejudicial effect on the jury's decision-making capacity.⁴ On review, the Mississippi Supreme Court affirmed the conviction and death sentence.⁵ On writ of certiorari, the United States Supreme Court, *held*, vacated, reversed and remanded.⁶ When the jury is given false comfort by prosecutorial comment that its decision to render the death penalty will or can be corrected on review, the fairness and reliability of the sentencing decision is so affected as to vio-

¹ Petitioner was Bobby Caldwell. *Caldwell v. State*, 443 So. 2d 806, 808 (Miss. 1983), *rev'd sub. nom.* *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2637 (1985).

² *Caldwell*, 105 S. Ct. at 2637. Bobby Caldwell, while robbing a small grocery store and bait shop, shot and killed Mrs. Elizabeth Faulkner, owner of the establishment in Panola County. *Caldwell v. State*, 443 So. 2d 806, 808 (Miss. 1983).

³ *Caldwell*, 105 S. Ct. at 2633. The jury in the circuit court convicted Caldwell for the murder of Elizabeth Faulkner and sentenced him to die in the gas chamber. *Caldwell v. State*, 443 So. 2d 806, 808 (Miss. 1983).

⁴ *Caldwell*, 105 S. Ct. at 2637-39. The prosecutor, in his closing argument at the sentencing stage of the trial, commented to the jury that its decision would not be final, since capital cases were automatically reviewable. *Id.* at 2637-38. The prosecutor had voiced objection to the defense lawyer's tactics which attempted to make the jury feel a sense of responsibility for its decision, thereby encouraging a lesser penalty than the death sentence. *Id.* Thus in response, the prosecutor sought to minimize the jury's sense of responsibility about its role. *Id.* Petitioner argued that such a remark violated the eighth amendment. *Id.* at 2638.

⁵ *Caldwell v. State*, 443 So. 2d 806, 812, 815 (Miss. 1983). The Mississippi Supreme Court unanimously affirmed the conviction but divided equally in affirming the death sentence. *Id.* The Mississippi court considered sua sponte the propriety of the prosecutor's remarks and rejected the contention that such comments could constitute an eighth amendment violation. *Caldwell*, 105 S.Ct. at 2638.

⁶ *Caldwell*, 105 S. Ct. at 2637-38. Certiorari was granted to consider petitioner's contention that the prosecutor's argument rendered the sentencing proceeding inconsistent with eighth amendment standards. *Id.* at 2636-37. Specifically, the Court considered the propriety of the prosecutor's remarks in terms of whether the statements impaired the ability of the jury to exercise rational sentencing discretion. *Id.* at 2639. The Court vacated the death sentence. *Id.* at 2646.

late the eighth amendment of the United States Constitution. *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985).

The fundamental guarantee prohibiting cruel and unusual punishment is embodied in the eighth amendment.⁷ Perhaps the earliest formal codification of this concept was the religious law of ancient Israel, which prohibited excessive punishment through the establishment of maximum limits for retributive justice.⁸ The concern for equality between the offense and the punishment⁹ was acknowledged officially in medieval England.¹⁰ Following this same course, the United States recognized the premise of equitable punishment,¹¹ and accordingly, the Supreme Court sought to interpret eighth amendment jurisprudence.¹²

⁷ U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

⁸ See EXODUS 21:23-25. The biblical principal of *Lex talionis* limited punishment to that which was identical to the offense. The best-known example of an identical talion was "an eye for an eye, a tooth for a tooth." See also LEVITICUS 24:19-20 (passage clarified *Lex talionis* notion that punishment should be commensurate to crime). See generally Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 844-45 (1969)(provided history of eighth amendment evolvement).

⁹ See ARISTOTLE, ETHICS 148-49 (Penguin Classics ed. 1955). A concern for equality between the offense and the punishment was expressed in early Greek philosophy. *Id.* A similar concept of equality was found in the penal laws of the Germanic peoples of the Middle Ages. T. DUFULA, THE VIKING LAWS AND THE MAGNA CARTA 51-52 (1963).

¹⁰ See W. McKECHNIE, MAGNA CARTA 287-93 (2d ed. 1914)(three chapters of Magna Carta were devoted to limiting amount of monetary penalties for certain criminal acts); see also 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 449-62, 513-18 (2d ed. 1898)(prior to adoption of English Bill of Rights in 1689, England created common-law prohibition against excessive punishments in any form).

¹¹ See Granucci, *supra* note 8, at 840 (Virginia was first to incorporate cruel and unusual clause into state constitution; in 1791, this clause became eighth amendment to United States Constitution).

¹² See *Wilkerson v. Utah*, 99 U.S. 130, 136-37 (1878)(first major examination of amendment where Court stated death was not unusual punishment for murder, but that legislative death penalties were subject to eighth amendment limitations); see also *McGautha v. California*, 402 U.S. 183, 196 (1971)(capital punishment issue brought into new focus; untrammelled jury discretion was constitutional); *Witherspoon v. Illinois*, 391 U.S. 510, 512 (1968)(death sentence invalid if venire persons were excluded because of objection to death penalty); *Robinson v. California*, 370 U.S. 660, 675-76 (1962)(Douglas, J., concurring)(established application of eighth amendment to states and further stated punishment must be related to crime, not abstract); *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(amendment's meaning derived from "evolving standards of decency" indicative of "maturing society"); *Weems v. United States*, 217 U.S. 349, 378-79 (1910)(first extensive analysis of amendment's scope rendering flexibility to words "cruel and unusual," and first mention of amendment's design to limit legislative power). See generally Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 645-47 (1966)(discussing evolution of eighth amendment standards in *Robinson* and *Weems*).

Through death penalty challenges, the Court attempted to define the parameters of the cruel and unusual punishment clause.¹³

One of the first instances in which the Court engaged in cruel and unusual punishment analysis was in *Furman v. Georgia*.¹⁴ In *Furman*, several defendants had been convicted of either murder or rape and had been sentenced to death; however, their death sentences were vacated in a per curiam order on the grounds of eighth amendment violations.¹⁵ Justice Marshall, in his concurring opinion, examined the meaning of "cruel and unusual,"¹⁶ and propounded the need for the establishment of standards by which to evaluate capital sentencing.¹⁷ Justice Douglas construed the amendment's application broadly and declared that punishment was unusual and cruel if it were administered in either an arbitrary or discriminatory fashion.¹⁸ In implicitly

¹³ See *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)(discussing unique nature of death penalty under eighth amendment jurisprudence). See generally Note, *The Court's Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590, 598 (1985)(expanded view of eighth amendment analysis initiated by capital punishment cases).

¹⁴ 408 U.S. 238 (1972)(per curiam); see Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 269 (1976)(discussing importance of this landmark case). See generally Note, *An Impermissible Punishment: The Decline of Consistency as a Constitutional Goal in Capital Sentencing*, 5 PACE L. REV. 371, 374 (1985)(*Furman* decision was first to focus on eighth amendment due process analysis)[hereinafter cited as Note, *An Impermissible Punishment*].

¹⁵ *Furman*, 408 U.S. at 240. *Furman* considered the imposition of the death penalty in two cases of rape and one case of murder. *Id.* The cases were *Furman v. State*, 225 Ga. 253, 167 S.E.2d 628, 629 (1969)(death penalty for murder), *rev'd per curiam sub nom.* *Furman v. Georgia*, 408 U.S. 238 (1972); *Jackson v. State*, 225 Ga. 790, 171 S.E.2d 501, 503 (1969)(death penalty for rape), *rev'd per curiam sub nom.* *Furman v. Georgia*, 408 U.S. 238 (1972); and *Branch v. Texas*, 447 S.W.2d 932, 934 (Tex. Crim. App. 1969)(death penalty for rape), *rev'd per curiam sub nom.* *Furman v. Georgia*, 408 U.S. 238 (1972).

Although the Supreme Court vacated the death sentence in a one page per curiam opinion, the true nature of the controversy was reflected in the issuance of five concurring and four dissenting opinions. *Furman*, 408 U.S. at 240.

¹⁶ *Furman*, 408 U.S. at 329 (Marshall, J., concurring). Justice Marshall stated that the relevant standards of decency which embodied eighth amendment principles of permissible punishment could conceivably change as our society matured. *Id.*

¹⁷ *Id.* at 330. The proponents for establishing such standards maintained that aggravating and mitigating circumstances should be balanced in the capital sentencing process. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962)(recommending that in capital cases aggravating and mitigating circumstances should be balanced); see also NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, PROPOSED STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 305 (1970)(suggesting, rather than requiring, examination of aggravating and mitigating circumstances).

¹⁸ *Furman*, 408 U.S. at 249 (Douglas, J., concurring).

overruling what had been the prevailing rationale,¹⁹ Justice Douglas proclaimed that unbridled discretion exercised by the jury in capital cases violated the eighth amendment.²⁰ In addition, Justice Douglas emphasized that a capital sentencing process which allowed unguided imposition of the death penalty could itself be as cruel as the penalty.²¹ Justice White, in his concurrence, refused to rule that the death penalty was unconstitutional per se, but rather he maintained that the infrequent enforcement of the penalty violated the eighth amendment.²²

In *Donnelly v. DeChristoforo*,²³ the Court confronted another aspect of capital sentencing procedure.²⁴ In this case, a decision had to be made as to whether or not an extraneous circumstance—a prosecutorial comment—had a prejudicial effect on the jury's capacity to impartially sentence the accused.²⁵ The *Donnelly* Court rejected the

¹⁹ D. PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY 95 (1982). In *McGautha v. California*, 402 U.S. 183, 221 (1971), the Supreme Court had held that the Constitution required no specific guidelines to limit jury discretion in capital sentencing. *Id.* See generally Comment, *Capital Sentencing—Effect of McGautha and Furman*, 45 TEMP. L.Q. 619, 621 (1972) (*Furman* altered rule established in *McGautha*; standardless sentencing was no longer constitutional).

²⁰ *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring).

²¹ *Id.* at 247-48. In his concurring opinion, Justice Brennan stated that death could be a cruel and unusual sentence when meted out arbitrarily and capriciously. *Id.* at 286 (Brennan, J. concurring); see *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (criminal punishment must be within standards of decency of eighth amendment); *Weems v. United States*, 217 U.S. 349, 378-79 (1910) (eighth amendment guarded against legislative abuse of power with respect to penalty impositions). See generally Note, *Constitutional Law—Safeguarding Eighth Amendment Rights with a Comparative Proportionality Review in the Imposition of the Death Penalty*, 28 HOW. L.J. 331, 340 (1985) (composite message of Court supported premise that eighth amendment was applicable to procedure by which punishment was administered).

²² *Furman*, 408 U.S. at 310-12 (White, J., concurring). Justice White stated that the death penalty was cruel and unusual because it was so rarely imposed that it had ceased to be a viable crime deterrent. *Id.* at 312. See generally Note, *supra* note 21, at 340 (explaining how *Furman* propounded idea of fairness and consistency in capital sentencing procedure); Note, *The Bitter Fruit of McGautha: Eddings v. Oklahoma and the Need for Weighing Method Articulation in Capital Sentencing*, 20 AM. CRIM. L. REV. 63, 81 (1982) (citing cases in which Supreme Court attempted to create equilibrium between consistency and individualization in capital sentencing procedure).

²³ 416 U.S. 637 (1974).

²⁴ *Id.* at 643. The Court closely examined whether certain prosecutorial conduct infected a death penalty procedure with unfairness to such an extent as to deny due process. *Id.*

²⁵ *Id.* at 640-41. During the closing argument of respondent's first-degree murder trial, the prosecutor responded to defense counsel's expression of hope that the jury would not return a verdict of guilty. *Id.* The prosecutor stated that the defendant and his attorney really hoped that the jury would find defendant guilty of something less

respondent's claim of constitutional error²⁶ and proclaimed that there was no denial of due process.²⁷ The Court based its reasoning on multiple considerations: that it was improbable that the jury would have taken the comment out of context;²⁸ that the trial court had taken corrective action;²⁹ and, moreover, that the prosecutor's remark was a small part of an extended trial.³⁰ The Court, however, advised that the decision to deny the respondent's claim should not imply that an instruction or comment itself may never be raised to a level of constitu-

than first-degree murder. *Id.* at 641. Defense counsel contended that because of the prosecutor's comments, the jury may have concluded that respondent had already admitted guilt in an effort to secure a lesser charge, and therefore, the remarks had prejudiced the sentencing decision. *Id.* at 640-42.

²⁶ *Id.* at 643-44. The respondent felt that the comment was so potentially misleading and prejudicial that its unmitigated effect on the jury amounted to a denial of due process. *Id.* at 643.

²⁷ *Id.* at 643. The Court noted that it had always exerted great efforts to ensure that prosecutorial conduct did not unduly infringe upon any of the specific guarantees of the Bill of Rights. *Id.* The Court did not believe that such a remark about the respondent's expectations was supportive of the contention that a fair trial had been denied to him. *Id.*; see also *Maggio v. Williams*, 464 U.S. 46, 49-50 (1983)(per curiam)(lower court applied *Donnelly* standard concerning prosecutor's closing argument).

²⁸ *Donnelly*, 416 U.S. at 644. Respondent and another defendant, alleged partners in the killing, were tried jointly. *Id.* at 639. Respondent maintained his innocence but the other defendant elected to plead guilty to a charge of second-degree murder. *Id.* The lower court then advised the jury that respondent's trial would continue. *Id.* at 639-40. Respondent sought no instruction that the jury should not draw an inference from the other defendant's plea and the trial court gave no such instruction. *Id.* at 640, 641 n.9. With regard to the prosecutor's remarks as considered in light of the co-defendant's guilty plea, the Supreme Court stated that it was merely speculative that the jury did infer from the prosecutor's statement that the respondent had made an admission of guilt. *Id.* at 644.

²⁹ *Id.* Not only did the prosecutor tell the jury that his argument was not to be considered as evidence, the trial judge reemphasized this point and further warned the jury to ignore the remark. *Id.*; see, e.g., *Howell v. State*, 411 So. 2d 772, 774 (Miss. 1982)(lower court directed jury not to consider comment concerning right to appeal in reaching its verdict); *Clemons v. State*, 320 So. 2d 368, 371 (Miss. 1975)(court noted well-established limits which regulate conduct of counsel).

³⁰ *Donnelly*, 416 U.S. at 645. The Court conceded that the challenged comments were ambiguous. *Id.* However, the Court did not find that the isolated remarks caused the respondent's trial to be constitutionally improper. *Id.*; cf. *Cupp v. Naughten*, 414 U.S. 141, 146-48 (1973)(instruction at criminal trial that witness is presumed to speak truth cannot be held in isolation, but must be viewed within context of overall charge); *Boyd v. United States*, 271 U.S. 104, 107 (1926)(established proposition that single instruction to jury must be judged within context of overall charge). But see *Griffin v. California*, 380 U.S. 609, 615 (1965)(state comment rule, used in jury instruction and by prosecutor, prejudiced rights of accused under fifth and fourteenth amendments).

tional error.³¹

In 1976, *Woodson v. North Carolina*,³² along with other decisions,³³ supported the established principle of nonarbitrary capital sentencing³⁴ and extended the constraints already imposed on death penalty procedure.³⁵ In *Woodson*, a plurality of the Court rejected, under the eighth amendment, a mandatory death penalty statute.³⁶ Applying both substantive and procedural eighth amendment theories, the Court invalidated the North Carolina statute³⁷ and reversed the death sentences of Woodson and his co-defendants.³⁸ The Court relied on the "respect for human decency" doctrine underlying the eighth amendment³⁹ and reasoned that the sentencing history in the United States

³¹ *Donnelly*, 416 U.S. at 645 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)); see, e.g., *Cool v. United States*, 409 U.S. 100, 104 (1972)(single jury instruction concerning defendant's conviction deemed to be constitutional error). See generally Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22, 22 (1973)(prosecutor must not do anything, intentionally or unintentionally, that might improperly influence jury, thereby denying fair trial to defendant).

³² 428 U.S. 280 (1976).

³³ See *Gregg v. Georgia*, 428 U.S. 153, 161-68 (1976)(reiterated *Furman's* principle of nonarbitrary capital sentencing and identified themes framing all subsequent capital sentencing adjudication); *Jurek v. Texas*, 428 U.S. 262, 268 (1976)(upheld Texas' guided discretion death penalty statute requiring jury to find one statutory aggravating circumstance before imposing death sentence); *Proffitt v. Florida*, 428 U.S. 242, 2257-58 (1976)(upheld Florida's guided discretion sentencing statute in which aggravating circumstances weighed against mitigating circumstances); *Roberts v. Louisiana*, 428 U.S. 325, 331, 336 (1976)(invalidated Louisiana's statute which made death mandatory for first-degree murder).

³⁴ See *supra* notes 18, 20, 21 and accompanying text.

³⁵ See Note, *An Impermissible Punishment*, *supra* note 14, at 374 (discussed additions each case made to eighth amendment analysis).

³⁶ *Woodson*, 428 U.S. at 305; see N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975)(enumerated various actions that were deemed to be murder in first-degree and subject to mandatory punishment by death).

³⁷ *Woodson*, 428 U.S. at 302-05. The Court applied *Furman's* reasoning which emphasized the need to impose standards to guide the jury in capital sentencing. *Woodson*, 428 U.S. at 302-04; see *supra* note 17 and accompanying text.

³⁸ *Woodson*, 428 U.S. at 305. Woodson and co-defendants were convicted of murder. *Id.* at 282-84. The murder, perpetrated during a robbery, fell into one of the categories that called for the death penalty. *Id.* at 284.

³⁹ *Id.* at 301; see *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(Court first expressed human decency doctrine). In *Trop*, the Supreme Court stated that the eighth amendment should be interpreted in light of ever-changing standards of human decency, and that the protections of the amendment were variable in accordance with societal change. *Id.* at 100-01.

reflected an aversion toward mandatory death penalty statutes.⁴⁰

In *Woodson*, the Court characterized North Carolina as a representative state which had responded to *Furman*'s condemnation of the arbitrary exercise of discretion by returning to the mandatory death penalty.⁴¹ Writing for the majority, Justice Stewart contended that these states had misinterpreted *Furman* since the noted principle of that case sought only to reduce arbitrary sentencing, not eliminate all sentencer discretion.⁴² The Court finally stated that capital cases, being predicated upon the realization that death was inherently different from other sentences,⁴³ required particularized consideration of the character and record of each convicted defendant before the death penalty could be imposed.⁴⁴

In *Lockett v. Ohio*,⁴⁵ the Supreme Court defined the degree of capital sentencing discretion⁴⁶ allowable under the eighth amendment with respect to mitigating factors.⁴⁷ The Court held that it was impermissible to limit consideration of mitigating factors to those prescribed by Ohio's statute.⁴⁸ The petitioner in the case, convicted of aggravated

⁴⁰ *Woodson*, 428 U.S. at 292-95. Throughout history, the Court noted, both jury determinations and legislative provisions have shown a general disapproval of mandatory death sentences in our society. *Id.*

⁴¹ *Id.* at 302.

⁴² *Id.* at 303; see *Furman*, 408 U.S. at 249, 257 (decision eliminated unfettered discretion).

⁴³ *Woodson*, 428 U.S. at 305.

⁴⁴ *Id.* at 303-04. The Court stated that North Carolina's mandatory death penalty statute was unconstitutional because it excluded consideration of the individual circumstances surrounding each defendant, and allowed blind imposition of death sentences. *Id.* See generally Goodpaster, *Judicial Review of Death Sentences*, 742 C.J. CRIM. L. & CRIMINOLOGY, 786, 788-89 (1983) (analyzed Court's reasoning and discussed integration of this case's logic with other decisions of its time).

⁴⁵ 438 U.S. 586 (1978).

⁴⁶ *Id.* at 601. The Court granted certiorari to consider whether Ohio's death penalty procedure was too constraining on the sentencer's discretion regarding mitigating factors. *Id.* at 589.

⁴⁷ *Id.* at 601. Any statute that prevented giving independent weight to mitigating circumstances was constitutionally impermissible. *Id.*; see Geimer, *Death At Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 744 (1985) (discussed tension between sentencing consistency and individualization in administration of the death penalty following *Woodson*). See generally Note, *An Impermissible Punishment*, *supra* note 14, at 382 (discussed Court's raising of individualization to level of constitutional goal).

⁴⁸ *Lockett*, 438 U.S. at 608; see also *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959) (Court required consideration of all mitigating circumstances for imposing proper sentence in capital case); *Williams v. New York*, 337 U.S. 241, 247 (1949) (Court held that it was proper for judge to consider all possible information concerning defendant's life

murder and robbery,⁴⁹ challenged the Ohio death penalty statute because it did not consider, as mitigating factors, any aspects of a defendant's character and record or any circumstances of the offense.⁵⁰ Drawing upon the concept of reliability in sentencing,⁵¹ the *Lockett* Court concluded that the consideration of mitigating factors could not be limited by statute.⁵² Thus, Ohio's statute was invalidated for having failed to allow the degree of individualized consideration of factors now held to be required by the eighth amendment.⁵³ *Lockett* established a new constitutional rule requiring unlimited sentencer discretion to act upon all mitigating circumstances of character, record, and offense.⁵⁴

In *Zant v. Stephens*,⁵⁵ the Supreme Court expanded capital sentencing standards by allowing increased sentencer discretion with regard to aggravating circumstances.⁵⁶ The *Zant* Court upheld a death sentence imposed on the respondent by a jury that had considered a constitutionally invalid aggravating circumstance in reaching its decision.⁵⁷ The majority observed that although the single invalid circum-

and characteristics for sentence selection); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)(for determination of appropriate sentence, character of accused and circumstances surrounding crime should be considered).

⁴⁹ *Lockett*, 438 U.S. at 593. Petitioner drove the getaway car and was convicted, as an aider and abettor, of a murder which was committed by one of her co-felons. *Id.*

⁵⁰ *Id.* at 602. Petitioner contended that the Ohio statute did not comply with the constitutional requirement that the sentencer be afforded the opportunity to consider fully all mitigating circumstances in capital cases. *Id.* The statute required consideration of only three specific statutory mitigating circumstances, thus foreclosing consideration of other mitigating factors. *Id.* at 607-08.

⁵¹ See *Gardner v. Florida*, 430 U.S. 349, 364 (1976)(White, J., concurring)(espousing need for reliability in determining appropriateness of death penalty); *Woodson*, 428 U.S. at 304-05 (consideration of character and record of individual offender and circumstances surrounding offense necessary to ensure reliability in death penalty sentencing).

⁵² *Lockett*, 438 U.S. at 604.

⁵³ *Id.* at 605-06.

⁵⁴ *Id.* at 608; see Note, *An Impermissible Punishment*, *supra* note 14, at 384 (Court's decision again stressed individualization over consistency).

⁵⁵ 462 U.S. 862 (1983).

⁵⁶ *Id.* at 872; see *Barclay v. Florida*, 463 U.S. 939, 956-58 (1983)(Court found no reversible error in state court's consideration of nonstatutory aggravating circumstances if elimination of consideration would not change result). See generally Geimer, *supra* note 47, at 766-72 (discussing relation of aggravating factors to individualized consideration of defendant).

⁵⁷ *Zant*, 462 U.S. at 866-69. Respondent Stephens received the death penalty after a finding of three statutory aggravating circumstances. *Id.* at 866-67. During pendency of his appeal, the Georgia Supreme Court invalidated one of these factors in another case. *Id.* at 867-68. The factor that defendant had a "substantial history of serious assaultive criminal convictions" was invalidated for vagueness. *Id.*; cf. *Stromberg v. California*, 283 U.S. 359, 363 (1931)(death sentence vacated if, out of independent grounds, jury verdict

stance could not support the death penalty, two other aggravating circumstances had been found to exist.⁵⁸ The Court further approved specific features of Georgia's sentencing scheme that promoted individualization.⁵⁹ Finally, the Court concluded that the most important objective at the selection stage⁶⁰ was the individualized determination of sentencing based upon the character of the offender and the circumstances of the crime.⁶¹

In adjudicating *California v. Ramos*,⁶² the Supreme Court continued its emphasis on individualization by upholding a legislative provision which had been subjected to constitutional attack.⁶³ The Court was again faced with having to pass judgment on whether an extraneous circumstance—a jury instruction on the possible commutation of a life sentence⁶⁴—had biased the jury's sentencing discretion.⁶⁵ The Su-

rested exclusively on insufficient ground).

⁵⁸ *Zant*, 462 U.S. at 879. The two other valid aggravating circumstances relied upon by the jury were that the respondent had a prior capital felony conviction and that he had escaped from the custody of a police officer and place of confinement. *Id.*

⁵⁹ *Id.* The Court stated that Georgia's scheme included features that guided the exercise of discretion. *Id.* at 875. The Court also noted that Georgia's scheme used aggravating factors to narrow the category of persons eligible for the death penalty. *Id.*

⁶⁰ *Id.* at 871-72. The selection stage referred to the process of choosing from among the class of eligible persons, those who would actually be sentenced to death. *Id.*

⁶¹ *Id.* at 872. The Court stressed the term "individualized." *Id.* at 879; see *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (Constitution required sentencer not to be precluded from considering defendant's character or record as mitigating factors).

⁶² 463 U.S. 992 (1983).

⁶³ See *id.* at 996. See generally Note, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking*, 35 STAN. L. REV. 787, 806-10 (1983) (eighth amendment requires individualized consideration of offender's character and record and circumstances of particular offense); Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1186 (1984) (discussing attention Court has given to individualization in capital sentencing procedure and how this has translated back to virtually unbridled discretion).

⁶⁴ *Ramos*, 463 U.S. at 995-98. The instruction objected to was the Briggs Instruction. *Id.* at 995-96 & n.4. During the penalty phase of the trial, California law required an instruction to the jury that a sentence of life without the possibility of parole might be commuted by the governor to permit parole. *Id.* at 995.

⁶⁵ *Id.* at 999. Respondent Ramos contended that a capital sentencing jury should not consider the possibility of a commutation. *Id.* at 998. Ramos further argued that this consideration injected an unacceptable degree of unreliability into the penalty determination, and that it detracted from the jury's constitutionally mandated responsibility of basing the sentence upon the individual circumstances surrounding the defendant and the offense. *Id.* The California Supreme Court had concluded that the instruction was unconstitutional because it injected an entirely irrelevant factor into the sentencing proceedings, and further, the court found that the instruction was prejudicial because it did

preme Court held that the instruction did not violate the Constitution.⁶⁶ The *Ramos* Court concluded, in response to the argument of unreliability in sentencing, that this commutation consideration was no more speculative than certain elements of a sentencing statute previously approved by the Court which called for the jury to consider the future dangerousness of the defendant.⁶⁷ The Court also rejected the argument that the commutation instruction diverted the jury's attention from the defendant's character and offense.⁶⁸ Its reasoning was that the jury could freely consider a multitude of factors to determine the appropriateness of the death penalty once the defendant was deemed eligible for such a punishment.⁶⁹

In *Wiley v. State*,⁷⁰ the Mississippi Supreme Court elaborated on the issue of prosecutorial remarks⁷¹ allegedly impairing the capital jury's ability to discharge its fair sentencing responsibility.⁷² *Wiley* diverted from the standard set forth in *Ramos* that comments and instructions to the jury which possibly impaired its sentencing capacity were constitutionally permissible.⁷³ The Mississippi Supreme Court stated that the narrow issue addressed in *Ramos* concerning the commutation-of-sentence instruction provided little guidance in determining what information should be put before a jury regarding the post-sentencing fate of a defendant.⁷⁴ With regard to the prosecutor's com-

not also inform the jury that a death sentence could similarly be commuted. *Id.* at 996.

⁶⁶ *Id.* at 1001.

⁶⁷ *Id.* at 1002. Similarly, the Briggs Instruction focused the jury's attention on the defendant's probable future dangerousness. *Id.* at 1003; see *Jurek v. Texas*, 428 U.S. 262, 268 (1976)(Texas statute proclaimed jury's duty to decide if defendant was a continuing societal threat; challenged factor in *Jurek* similar to that in *Ramos*).

⁶⁸ *Ramos*, 463 U.S. at 1005.

⁶⁹ *Id.* at 1004-06.

⁷⁰ 449 So. 2d 756 (Miss. 1984).

⁷¹ *Id.* at 761. The prosecutor's closing argument contained the statement that any decision the jury rendered would be automatically reviewable. *Id.* The prosecutor's comments followed an argument by the defense attorney for the imposition of a lesser sentence than the death penalty. *Id.*

⁷² *Id.* at 762.

⁷³ *Id.* The Mississippi Supreme Court emphasized that the state's present course with regard to this particular sentencing issue was a diversion from the previous standard that such an argument might be constitutionally permissible. *Id.* See generally ABA STANDARDS OF CRIMINAL JUSTICE § 3-5.8 (2d ed. 1980)(comments to jury that other courts or authorities would correct erroneous convictions were impermissible efforts to lessen jury's sense of responsibility for its decision).

⁷⁴ *Wiley*, 449 So. 2d at 761-62. The court further observed that since *Ramos* had expressly delegated the responsibility for establishing such guidelines to the individual states, then it possessed the freedom to determine its own standard. *Id.* at 762.

ment that the respondent's death sentence would be automatically subject to review, the *Wiley* court found that such a statement had the effect of reducing the jury's sense of gravity for the sentencing decision and was therefore impermissible.⁷⁵

In the instant case, the Court reasoned that since the states do not have absolute freedom to expose capital sentencing juries to any post-sentencing procedural information,⁷⁶ then certain types of prosecutorial comments made at trial are constitutionally impermissible.⁷⁷ The *Caldwell* Court held that since the prosecutor's argument was not validly linked to any sentencing consideration,⁷⁸ then the capital sentence should be vacated. Finally, the Court concluded that since sentencer discretion is a vital aspect of eighth amendment standards,⁷⁹ and since, in this case, substantial unreliability and prejudice existed in favor of imposing the death sentence, then the prosecutor's comments violated the eighth amendment.⁸⁰

⁷⁵ *Id.* at 762-63. The court stated that any argument by the state which minimized the jury's sense of obligation and responsibility for the fate of the accused was a serious error. *Id.*; see also *Williams v. Mississippi*, 445 So. 2d 798, 799-802 (Miss. 1984)(death penalty reversed since defendant was denied fair hearing because prosecutor's remark caused jury to feel less responsible about its role); *Howell v. State*, 411 So. 2d 772, 777 (Miss. 1982)(prosecutor's statement that jury verdict was subject to appeal amounted to reversible error because of necessity of maintaining jury's sense of responsibility).

⁷⁶ *Caldwell*, 105 S. Ct. at 2643. The Court criticized the respondent and the prevailing justices of the Mississippi Supreme Court for interpreting *Ramos* too broadly with respect to post-sentencing argument exposure. *Caldwell*, 105 S. Ct. at 2643.

⁷⁷ *Id.* at 2639. The Court reasoned that comments made to a capital sentencing jury must not be such as to lead it to feel less responsibility for its task of determining the appropriateness of the defendant's sentence. *Id.* The Court concluded that capital punishment required a greater degree of scrutiny in the sentencing determination. *Id.*

⁷⁸ *Id.* at 2643. The Court did not find any valid state penological interest linked to the argument. *Id.* Furthermore, the argument was inaccurate and misleading, since it depicted the jury's role as fundamentally at odds with the true role that a capital sentencer must perform. *Id.*; see also *Miller v. Pate*, 386 U.S. 1, 5-6 (1967)(prosecutor misrepresented truth about physical evidence so as to prejudice jury's decision in criminal sentencing); *Brady v. Maryland*, 373 U.S. 83, 86 (1963)(prosecutor's suppression of evidence from jury, which was favorable to accused, violated due process); *Hill v. State*, 432 So. 2d 427, 439 (Miss. 1983)(prosecutor's comment that jury's verdict was not "last word" distorted jury's sense of sentencing responsibility and was improper); *Howell v. State*, 411 So. 2d 772, 774 (Miss. 1982)(prosecutor's argument that incorrect jury verdict would be corrected by appellate court was in error).

⁷⁹ *Caldwell*, 105 S. Ct. at 2645. The prosecutor's remarks were described by the Court as being focused and pointed directly at the procedure by which the state imposes the death sentence. *Id.* In this case, the prosecutor sought to give the jury a distorted view of its role which was incompatible with the need for the reliable determination of appropriate punishment. *Id.*

⁸⁰ *Id.* at 2645-46. The eighth amendment required a standard of reliability in capital

In a dissent, Justice Rehnquist⁸¹ contended that since the prosecutor's argument fell far short of telling the jury that it would not be responsible for imposing the death penalty,⁸² the prospect of appellate review alone should not bias the jurors in their sentencing capacity.⁸³ Justice Rehnquist reasoned that since the Court's previous opinions did not adequately support the position the Court had taken,⁸⁴ then it should not follow that every deviation from the standard sentencing procedure should be proclaimed as constitutionally unreliable in viola-

sentencing. *Id.* The prosecutor infringed on that fundamental premise since his comment sought to minimize the sentencing jury's sense of responsibility. *Id.* In a concurrence, Justice O'Connor reasoned that since the prosecutor's remarks were so inaccurate and misleading as to diminish the jury's sense of responsibility, then such comment was impermissible. *Id.* at 2646 (O'Connor, J., concurring). The concurrence further stated that since the jurors might harbor misconceptions concerning appellate review, and moreover, since they might not appreciate, without clear explanation, the limited nature of such review, then vacating the death penalty was appropriate in view of the fact that such argument violated the eighth amendment's standard of reliability. *Id.* at 2647.

On remand to the Mississippi Supreme Court, Caldwell made a motion that the judgment of capital murder be vacated or set aside. *Caldwell v. Mississippi*, No. 54,285 (Miss. Dec. 18, 1985). He stated the following as grounds for such relief: (1) the use of peremptory challenges to strike blacks and women from the jury, (2) conduct of proceedings outside the presence of the defendant, (3) ineffective assistance of counsel, (4) the court's instruction on intent, (5) prosecutorial misconduct during argument, (6) death-qualification of the jury, and (7) insufficiency of notice in the indictment. *Caldwell v. Mississippi*, No. 54,285, slip op. at 1-6 (Miss. Dec. 18, 1985). The court found no merit in any of Caldwell's contentions and overruled the motion to vacate or set aside. *Id.*

The assertion of prosecutorial misconduct during argument was of special importance since this was the basis upon which the United States Supreme Court vacated the death sentence and remanded for further proceedings. *Caldwell*, 105 S. Ct. at 2646. However, the Mississippi Supreme Court, on remand, restated the position that there was no reversible error committed during the *guilt-or-innocence* phase of the prosecutor's argument. *Caldwell v. Mississippi*, No. 54,285, slip op. at 4 (Miss. Dec. 18, 1985).

⁸¹ *Caldwell*, 105 S.Ct. at 2647-51 (Rehnquist, J., dissenting). Justice Rehnquist was joined in his dissent by Chief Justice Burger and Justice White. The dissent criticized the majority for having supplied its own sweeping characterization that such prosecutorial remarks had the adverse effect of lowering the jury's sense of responsibility. *Id.* at 2648-49.

⁸² *Id.* at 2649-50. Justice Rehnquist stated that in reviewing the prosecutor's argument as a whole, it did not suggest that the idea of appellate review should motivate the jurors to invoke the death penalty. *Id.* Moreover, the prosecutor's remarks, following the challenged portion of the argument, stressed the importance of the sentencing responsibility placed upon the jury under Mississippi law. *Id.* at 2650.

⁸³ *Id.*

⁸⁴ *Id.* at 2650-51. Justice Rehnquist noted that the Court's previous opinions allowed individualized consideration and rational determination of the appropriateness of capital punishment. *Id.*

tion of the eighth amendment.⁸⁵ Finally, the dissent concluded that the eighth amendment does not prohibit all communication to a capital sentencing jury concerning review of its decision,⁸⁶ and the record did not show that the jury returned a sentence on any other basis than the evidence presented;⁸⁷ therefore, the petitioner's sentence should not be overturned.

A great deal of confusion exists as to what has emerged from eighth amendment analysis with respect to death penalty procedure.⁸⁸ To achieve the goal of imposing fair sentences, the Court implicitly adopted a strategy to manipulate sentencer discretionary power at the state level, but the Court has never expressly announced that such manipulation was its objective.⁸⁹ The Court has, to the detriment of eighth amendment jurisprudence, fallen into a circular pattern of decision-making.⁹⁰ The underlying premise behind eighth amendment law began with the Court's desire to guide capital sentencing by "consistent" application of standards to ensure reliability in the sentencing process.⁹¹ The Supreme Court, however, carried this concept further in proclaiming that capital sentencing also required individualization.⁹² With regard to this dichotomy, the Court has decreased emphasis on

⁸⁵ *Id.* at 2651. The dissent maintained that the Court should have relied on *Donnelly* and *Zant* which implied that death sentences need not always be vacated because of some flaw in the procedure. *Id.*

⁸⁶ *Id.* Justice Rehnquist stated that the eighth amendment did not ban all communication to the jury concerning the availability of review as exemplified by the *Ramos* opinion. *Id.* Rehnquist further reasoned that the subject of appellate review was a matter about which the jury was entitled to know. *Id.*

⁸⁷ *Id.* The dissent concluded that the prosecutor's argument was not objectionable since he stressed to the jury that their singular duty was to find that the aggravating factors outweighed the mitigating factors in order to impose the death penalty. *Id.*

⁸⁸ See Geimer, *supra* note 47, at 739 (recent Supreme Court decisions illustrated return of death penalty sentencing to "same roulette wheel proposition it was at the time of *Furman*").

⁸⁹ See Note, *supra* note 63, at 793 (Court abandoned objective rationality in capital sentencing analysis).

⁹⁰ See, e.g., *Lockett*, 438 U.S. at 622 (White, J., concurring in judgment)(regarding Court's decision allowing unlimited sentencer discretion of mitigating circumstances, Justice White argued that decision contradicted *Furman*'s invalidation of unguided discretion); *Lockett*, 438 U.S. at 631 (Rehnquist, J., concurring and dissenting)(Rehnquist admonished that decision here would not reduce arbitrary sentencing, but instead would "institutionalize" it).

⁹¹ See *supra* notes 14-21 and accompanying text. See generally, Note, *supra* note 21, at 333-43 (discussing eighth amendment background with *Furman* serving as benchmark for providing capital punishment guidelines).

⁹² See *supra* notes 44, 48 and accompanying text, and text accompanying notes 52, 59.

the constitutional goal of consistency while upholding procedures which stress individualization, thereby diminishing the chance that consistency can ever be achieved.⁹³ *Zant* and *Ramos* have suggested that the Court appears to have almost completely abandoned its primary goal of consistent application of the death penalty.⁹⁴ Since the Court has permitted individualized consideration of the circumstances surrounding the defendant and offense, the sentencer is basically allowed to disregard previous sentencing guidelines.⁹⁵

In essence, death penalty procedure prior to *Caldwell* had returned to the type of arbitrary sentencing which occurred before *Furman*.⁹⁶ The *Caldwell* decision indicates that the Supreme Court's theme of individualization has been loosely construed in the past.⁹⁷ This fact is exemplified by the Mississippi Supreme Court's broad interpretation of *Ramos*.⁹⁸ In *Caldwell*, however, the United States Supreme Court rendered a decision establishing objective guidelines dealing with the impermissibility of commenting to a capital sentencing jury about appellate review.⁹⁹ The *Caldwell* decision seems to clearly resolve the issue of prosecutorial infringement upon the role of the capital sentencing jury.¹⁰⁰

The *Caldwell* decision is perhaps even more noteworthy in the sense that it reflects the Court's recognition that its adjudication of death penalty cases has been confusing.¹⁰¹ Accordingly, the case at hand elicits the issuance of guidelines to eliminate the disarray associated with individualized capital sentencing procedure.¹⁰² Unless the Supreme Court returns to and preserves the constitutional goal of consistency, the death penalty procedure will become as cruel and unusual as the punishment itself.¹⁰³

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⁹³ See *supra* notes 59-61 and accompanying text (Court's attention shifted to implementing individualization in capital sentencing process).

⁹⁴ See Note, *An Impermissible Punishment*, *supra* note 14, at 395 (Supreme Court, through the decisions of *Ramos* and *Zant*, minimized goal of consistency).

⁹⁵ See *supra* notes 54, 51 and 67 and accompanying text (review of decisions illustrated progressive movement toward unlimited sentencer discretion).

⁹⁶ See Note, *supra* note 63, at 792 (discussed movement back to arbitrary sentencing).

⁹⁷ See *supra* text accompanying notes 75, 76.

⁹⁸ See *supra* text accompanying notes 66-68.

⁹⁹ See *supra* notes 76-79 and accompanying text.

¹⁰⁰ See *supra* note 72 (*Caldwell* decision in accord with ABA standards and with Mississippi Supreme Court decisions since *Caldwell*).

¹⁰¹ See *supra* note 91 and accompanying text.

¹⁰² See *supra* notes 75-79 and accompanying text.

¹⁰³ See *supra* notes 19-23 and accompanying text.

EMPLOYMENT DISCRIMINATION—SUCCESSOR LIABILITY—DOCTRINE
OF SUCCESSOR LIABILITY APPLICABLE IN SECTION 1981 ACTION
FOR EMPLOYMENT DISCRIMINATION

Plaintiff¹ filed suit in the United States District Court for the Northern District of Illinois seeking damages² from his employer³ for alleged employment discrimination⁴ in violation of Section 1981 of the Civil Rights Act of 1866.⁵ Subsequent to the filing of the suit and prior to its resolution, the employer sold substantially all its assets to another corporation.⁶ Plaintiff amended his complaint to include the successor as a defendant.⁷ The successor company contended that it was merely a purchaser of the former company's assets and therefore not liable for any debts of that company.⁸ Thus, the successor moved for

¹ Plaintiff, Maswamba Musikiwamba, was a thirty-year old black man. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 742 (7th Cir. 1985).

² *Id.* at 743. In the original complaint founded on the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982), plaintiff sought actual and punitive damages in the amount of \$650,000. *Musikiwamba*, 760 F.2d at 743. Plaintiff amended his complaint to include state law claims of breach of contract, quantum meruit, wrongful discharge, and breach of implied contract. *Id.* Plaintiff claimed compensatory damages of \$300,000 and punitive damages of \$1,000,000 in the amended complaint. *Id.*

³ *Id.* Plaintiff's employer was Electronic Support Systems, Inc. (Electronic). *Id.* at 742. Two officers of Electronic, Gary Crews and Jack M. Heeren, were also named as defendants. *Id.* at 742-43.

⁴ *Id.* at 743. Plaintiff alleged that because he was black he was paid a lower salary, denied sales commissions, and ultimately wrongfully discharged. *Id.* To support his allegations of discrimination, plaintiff contended that upon his initial employment at Electronic he was required to sign a covenant not to compete, while white employees in the same position were exempted from signing such an agreement. *Id.* at 742. After a brief time, plaintiff transferred to a position as an accounts representative, but was allegedly refused the same sales commissions and salary as all white representatives. *Id.* Plaintiff also asserted that, upon his discharge from Electronic, a white employee assumed his position at a substantially higher salary. *Id.*

⁵ Civil Rights Act of 1866, ch. 114, 6 Stat. 144 (1870)(codified at 42 U.S.C. § 1981 (1982)). Section 1981 guarantees that all persons within the jurisdiction of the United States have a right equal to that of white citizens to enjoy the benefits and protections provided by our laws.

⁶ *Musikiwamba*, 760 F.2d at 743. Electronic sold its assets to ESSI, Inc. for an amount considerably less than the value of Electronic's secured and unsecured debts. *Id.*

⁷ *Id.* Both the corporation, ESSI, Inc., and its president and only shareholder, Shalabh Kumar, were added as defendants. *Id.* at 743.

⁸ *Id.* at 744.

dismissal of the action against it.⁹ The district court granted the motion, holding that the successor doctrine¹⁰ was inapplicable to actions brought pursuant to section 1981.¹¹ The United States Court of Appeals for the Seventh Circuit, *held*, affirmed in part,¹² reversed and remanded in part.¹³ Where a predecessor employer commits discriminatory acts against an employee, the successor doctrine may be applied to hold the successor company liable in a section 1981 claim for employment discrimination. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985).

The National Labor Relations Board (NLRB),¹⁴ in its orders to employers to remedy unfair labor practices,¹⁵ evoked the doctrine of successorship¹⁶ by including language which made such orders binding upon the employer and successors.¹⁷ The case of *Regal Knitwear Co. v.*

⁹ *Id.*

¹⁰ *See*, *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees Int'l Union*, 417 U.S. 249 (1974). The doctrine of successorship, *i.e.*, liability of a successor employer, depends not merely on the fact one employer succeeds the other but also on whether the successor employer will be held liable for the legal obligations of the former employer. *Id.* at 262-63 n.9.

¹¹ *Musikiwamba*, 760 F.2d at 744.

¹² *Id.* at 742. The court of appeals affirmed the lower court's decision dismissing the claims against the successor corporation's president and sole shareholder, Kumar. *Id.* at 744. An officer or shareholder of a successor corporation cannot be held personally liable for a predecessor's employment discrimination, even though the officer or shareholder had notice of the lawsuit prior to the purchase and nevertheless actively negotiated for the sale. *Id.* Personal liability may be imposed, however, if it can be proved that the officer or shareholder participated in some manner in the discrimination or colluded in a sham transaction to defraud creditors. *Id.* at 754.

¹³ *Id.* at 742. Although the appellate court reversed the lower court's decision denying the application of the successor doctrine to § 1981 claims for employment discrimination, the court noted that such a claim must be alleged with specificity. *Id.* at 744. The court found that plaintiff's allegations were deficient in this respect, but granted plaintiff an opportunity to amend his complaint on remand to state adequately his claim for successor liability. *Id.* at 753.

¹⁴ The National Labor Relations Act (NLRA), also commonly called the Labor Management Relations Act, prohibits certain unfair labor practices as enunciated by the Act. National Labor Relations Act, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)). Congress empowered the National Labor Relations Board with administrative authority to review charges of unfair labor practice and to order remedial measures. *Id.* § 160(a). NLRB orders are, however, subject to review by the United States courts of appeals upon petition by either the Board for judicial enforcement of its orders or by a party aggrieved by the Board's orders. *Id.* § 160(e)-(f).

¹⁵ *See supra* note 14.

¹⁶ *See supra* note 10.

¹⁷ *See, e.g.*, *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 10 (1945)(order binding upon respondent and "its officers, agents, successors, and assigns").

NLRB¹⁸ questioned the legality of including successors in the language of a Board order.¹⁹ The United States Supreme Court considered the conflicting approaches taken by some of the lower courts on the same issue.²⁰ The Court conceded that administrative agencies have broad powers for shaping remedies.²¹ However, the Court also noted that these powers should not be so broad as to impose punishment on persons who have acted independently or whose rights have not been legally adjudged.²² The Court determined that in certain circumstances a successor may very well be within the remedial authority of the Board.²³ As such, the Court ruled that the provision binding successors was not illegal by its mere inclusion in a Board order.²⁴ However, the initial attempts by the NLRB failed to establish a consistent rationale in the application of the successor doctrine.²⁵

¹⁸ 324 U.S. 9 (1945).

¹⁹ *Id.* at 15-16. No specific facts were before the Court for decision. Instead, the Court was asked solely in an abstract context to rule on the legality of the provision. *Id.*

²⁰ *See, e.g.,* NLRB v. Gluek Brewing Co., 144 F.2d 847, 857 (8th Cir. 1944)(order held proper, but terms applied so as to avoid punishment of the innocent); NLRB v. Brezner Tanning Co., 141 F.2d 62, 65 (1st Cir. 1944)(language held proper because it prevented the evasion of order by change in ownership); NLRB v. Blackstone Mfg. Inc., 123 F.2d 633, 635 (2d Cir. 1941)(wording held proper, but such words alone not sufficient to impose liability where it would not otherwise exist); Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 650-51 (D.C. Cir. 1941)(order held acceptable, but not enforceable against successor who had no notice of violation or did not assist predecessor in commission of violation). *But see* Le Tourneau Co. v. NLRB, 150 F.2d 1012, 1012 (5th Cir. 1945)(words of successorship unnecessary since order enforceable against successor as privy of predecessor); NLRB v. Cleveland-Cliffs Iron Co., 133 F.2d 295, 302 (6th Cir. 1943)(inclusion of successorship language exceeds that necessary to prevent unfair labor practices); NLRB v. Bachelder, 125 F.2d 387, 388 (7th Cir. 1942)(held "successors and assigns" should be stricken from order since such words connote good faith successors and assigns).

²¹ *Regal Knitwear*, 324 U.S. at 13.

²² *Id.*

²³ *Id.* at 16. The Court very carefully pointed out that its decision in no way reflected upon whether a particular successor would be held liable or under what circumstances liability would be imposed. *Id.* at 15.

²⁴ *Id.*

²⁵ *See, e.g.,* Perma Vinyl Corp., 164 N.L.R.B. 968, 969 (1967), *enforced sub nom.* United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 548 (1968)(one who acquired business, with notice of predecessor's unfair labor practices, responsible for remedying predecessor's unlawful conduct); Symns Grocer Co., 109 N.L.R.B. 346, 347-48 (1954)(mere fact that successor purchased business with knowledge of proceedings against predecessor and continued business with same personnel not sufficient to hold buyer responsible for predecessor's wrongs); Alexander Milburn Co., 78 N.L.R.B. 747, 748-49 (1947)(bona fide purchaser of business liable for predecessor's wrongs if purchaser buys with knowledge of unfair labor practice charges); South Carolina Granite Co., 58 N.L.R.B. 1448, 1468-69 (1944)(successor bound where it retained supervisors charged

In *Alexander Milburn Co.*,²⁶ the NLRB held the successor responsible for remedying the unfair labor practices of the predecessor.²⁷ Since the same personnel were retained and the plant operated in the same manner as before the purchase, the Board reasoned that the successor had benefited from the predecessor's violations.²⁸ The Board further reasoned that since the successor had knowledge of the unfair labor practices prior to the purchase,²⁹ the successor had effectively substituted itself for the predecessor and must be held to have assumed the predecessor's obligations.³⁰ The *Alexander Milburn* decision was overruled by the *NLRB v. Birdsall-Stockdale Motor Co.*³¹ ruling. The United States Court of Appeals for the Tenth Circuit found the successor was a bona fide purchaser who had not been connected in any way with the predecessor's unfair labor practices.³² In such a situa-

with discriminatory discharge of employees). See generally, Comment, *The Successorship Doctrine: In Search of a New Focus*, 17 WILLAMETTE L.J. 405, 420-30 (1981)(development of various criteria for application of successorship doctrine).

²⁶ 78 N.L.R.B. 747 (1947), overruled by *Symns Grocer Co.*, 109 N.L.R.B. 346, 347 (1954).

²⁷ *Alexander Milburn*, 78 N.L.R.B. at 748.

²⁸ *Id.* at 748-49.

²⁹ *Id.* at 748. In contrast, the United States Court of Appeals for the Fourth Circuit held a successor liable for unfair labor practices even though the successor had no knowledge of the predecessor's acts. *NLRB v. Blair Quarries*, 152 F.2d 25, 26 (4th Cir. 1945). The court noted, however, that the successor may have been liable for its own violations of labor practices based on the foreman's actions subsequent to the business transfer. *Id.* at 25-26.

³⁰ *Alexander Milburn*, 78 N.L.R.B. at 749.

³¹ 208 F.2d 234 (10th Cir. 1953). The *Birdsall-Stockdale* decision prompted the NLRB to reconsider its decision in *Symns Grocer Co.*, 103 N.L.R.B. 622, 623-24 (1953)[hereinafter *Symns Grocer Co. I*], whereby the NLRB had ruled that a successor could be required to remedy the unfair labor practices of a predecessor. The Board adopted the *Birdsall-Stockdale* decision that mere knowledge of an unfair labor practice is not enough to hold a successor liable, and that a person must have engaged in the violation in order to be held to remedial orders. *Symns Grocer Co.*, 109 N.L.R.B. 346, 347-48 (1954) [hereinafter *Symns Grocer Co. II*]. See *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284, 288-89 (5th Cir. 1954)(imposition of order on successor conditioned upon finding that successor committed unfair labor practice or assisted predecessor in violation or in scheme to evade Board's order). With the *Symns Grocer Co. II* ruling, the decision in *Alexander Milburn Co.* was overruled. *Symns Grocer Co. II*, 109 N.L.R.B. at 347-48.

³² *Birdsall-Stockdale*, 208 F.2d at 237. The successor had merely purchased the realty and inventory of cars, along with some equipment, accounts receivable, and work in progress. *Id.* at 235. In addition, the successor made some changes in the business operations after the purchase. *Id.* The court of appeals pointed out that, where the operations are "merely a disguised continuance of the old employer," the successor will be bound by the Board's orders. *Id.* at 237; see *Regal Knitwear*, 324 U.S. at 14 (successors who are "disguised continuance" of predecessor bound by NLRB orders). A "disguised continu-

tion, the court ruled that, in balancing the policy of the National Labor Relations Act (NLRA) against other public policy, it would be inequitable to hold the successor responsible for the predecessor's labor violations.³³

In 1964, the United States Supreme Court considered the application of the successor doctrine,³⁴ not in an abstract context as presented in *Regal Knitwear*, but rather in an actual fact situation. In *John Wiley & Sons, Inc. v. Livingston*,³⁵ the United States Supreme Court resolved the question of whether a successor corporation could be required to arbitrate pursuant to a collective bargaining agreement between the predecessor corporation and its employees' union.³⁶ Although the Court recognized that the duty to arbitrate was founded on a contract which the successor had neither agreed to nor signed, other factors compelled the Court to consider the issue.³⁷ Foremost in the Court's deliberation was the national labor policy objective of settling labor disputes and the important role arbitration played in achievement of this goal.³⁸ The Court determined the proper approach was to balance the employer's rights against the goal of protecting employ-

ance" occurs when there is merely a change in name or a change in apparent, but not actual, control. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). The "disguised continuance" is simply a recognized exception to the generally accepted corporate rule that where one company sells its assets to another, the latter company is not liable for the debts and liabilities of the former company. 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (rev. perm. ed. 1983).

³³ *Birdsall-Stockdale*, 208 F.2d at 237.

³⁴ See Silver, *Reflections on The Obligations of a Successor Employer*, 2 CARDOZO L. REV. 545, 547-57 (1981)(discussion of Supreme Court treatment of successor liability).

³⁵ 376 U.S. 543 (1964).

³⁶ *Id.* at 544. Interscience, a corporation of 80 employees, merged with the Wiley corporation. Since none of Wiley's 300 employees were union members, and since only 40 of Interscience's employees were union represented, Wiley refused to recognize the union or to acknowledge any of the union's claims on behalf of the merged employees. The union argued that it was still the representative of Interscience's employees despite the merger and that, at a minimum, as the successor corporation Wiley was bound by the agreement to arbitrate. *Id.* at 545. Upon Wiley's persistent refusal to cooperate, the union filed suit under the Labor Management Relations Act to compel arbitration. *Id.* at 544.

³⁷ *Id.* at 550.

³⁸ *Id.* at 549. Prior to Wiley, the United States Supreme Court expressed the promotion of industrial stabilization as federal policy in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The Court held the arbitration provision in a collective bargaining agreement to be a major factor in achievement of industrial peace. *United Steelworkers*, 363 U.S. at 578. The Wiley Court reasoned that if the duty to arbitrate was automatically dissolved as a result of a business transfer, then the labor objectives would be undermined. Wiley, 376 U.S. at 549.

ees,³⁹ and reasoned that, in appropriate circumstances,⁴⁰ a predecessor's agreement to arbitrate could be enforced against a successor.⁴¹

However, the *Wiley* Court did not establish any boundaries on the application of the successor doctrine.⁴² The United States Supreme Court in *NLRB v. Burns International Security Services, Inc.*,⁴³ refused to apply the reasoning in *Wiley* to enforce the substantive provisions of a predecessor's contract upon the successor.⁴⁴ Although affirming the duty to arbitrate,⁴⁵ the majority ruled that the *Wiley* decision could not be interpreted so broadly as to hold a successor bound to the provisions of a contract to which he had not consented⁴⁶

³⁹ *Wiley*, 376 U.S. at 549. The Court recognized that an employer should be free to rearrange or even to close permanently his business at his own discretion. However, the Court also realized that employees are usually helpless to protect their rights when a change in business is being considered. Since employees are not usually invited to participate in negotiations, the Court reasoned that any consideration given to the well-being of such employees would be only incidental to the welfare of the employer. *Id.*

⁴⁰ *Id.* at 548. Although not formally stated as a condition, the Court considered continuity in the business between the predecessor and the successor as necessary before imposing any duty on a successor to arbitrate. The Court held that the "wholesale transfer" without any difficulty between Interscience and Wiley was sufficient continuity. *Id.* at 551. *But see Slicker, A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051, 1078-79 (1973) (reasoning that, although relevant, ease of transfer alone not sufficient to deduce existence of successorship).

⁴¹ *Wiley*, 376 U.S. at 548.

⁴² *See EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1089 (6th Cir. 1974) (discussing *Wiley* and its applications).

⁴³ 406 U.S. 272 (1972).

⁴⁴ *Id.* at 285. Based upon competitive bids, Lockheed plant awarded to Burns a security services contract which had previously been serviced by Wackenhut Corporation. Only 15 of Burns' guards in other locations were transferred to Lockheed, while 27 of the Wackenhut guards were hired. Since Burns' employees were already represented by a union, Burns refused to recognize and arbitrate with the former Wackenhut employees' union. *Id.* at 275. Charges of unfair labor practice were filed with the National Labor Relations Board. *Id.* at 276. The Board ruled that national labor policy required Burns to honor the Wackenhut contract with the union and to be bound to its provisions as if Burns had been a party to the contract. *Id.* at 276 n.2.

⁴⁵ *Id.* at 281. The Court reasoned that where the bargaining unit remains the same and a majority of the predecessor's employees are hired by the successor, then enforcement of an arbitration clause in the predecessor's contract is proper. *Id.* The record of oral argument, however, noted that the analysis need not necessarily be a technical majority, but rather a substantial number. *Id.* at 281 n.6.

⁴⁶ *Id.* at 286. The United States Supreme Court previously considered this issue in a simple employer/employee context, rather than a successor situation. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 100 (1970). Although the Court agreed that the Board could compel an employer to bargain, the Court held the Board was without the authority to order the employer to accept a substantive provision of a bargaining agreement. *Id.* at 102. The

merely because he was performing the "same work in the same place with the same employees as his predecessor."⁴⁷ In such a situation, the Court reasoned that the freedom to contract substantially outweighed the inequities which might result from enforcement of the contract.⁴⁸ The Court determined that labor policy only required that the parties be afforded an opportunity to negotiate, and that any advantage obtained by a party should be a reflection only of the relative bargaining strengths in the negotiation process rather than a forced contractual arrangement.⁴⁹

In *Golden State Bottling Co. v. NLRB*,⁵⁰ the United States Su-

Court reasoned that the purpose of the NLRA was to ensure that employers and employees have an opportunity to work out differences through the negotiation process. *Id.* at 103. However, the Court also realized that "agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." *Id.* at 103-04.

⁴⁷ *Burns*, 406 U.S. at 291. The Court attempted to distinguish *Burns* from *Wiley* on the basis that *Burns* did not involve a merger or sale as had *Wiley*. In fact, the predecessor and successor in *Burns* were directly competing for the same work. *Id.* at 286. For this very reason, four dissenting justices would have held *Burns* not a successor for any purposes and would have denied even the duty to arbitrate. *Id.* at 307 (Rehnquist, J., dissenting, joined by Burger, C.J., Brennan, J., and Powell, J.); see Slicker, *supra* note 40, at 1097-1102 (comparison of *Burns* and *Wiley*).

⁴⁸ *Burns*, 406 U.S. at 287. The Court considered that in certain situations, for example a failing business, a purchaser may be willing to acquire a company only if substantial changes could be made in the organizational structure and operations, in an effort to make the business profitable. *Id.* at 287-88. If the purchaser was bound to a contract which prohibited such changes, serious restrictions on the free transfer of capital could result. *Id.* at 288. National Labor Relations Board member Murdock expressed identical concerns in his dissenting opinion of the *Alexander Milburn* decision. *Alexander Milburn*, 78 N.L.R.B. at 755 (Murdock, dissenting). Murdock conceded that imposing liability on a successor for a predecessor's unfair labor practices would effectuate the policies of the NLRA. *Id.* However, in Murdock's view, such action harmed other public policies which sought to encourage buying and selling of property without undue restrictions. *Id.* See generally Marsack & Eaton, *Successorship Law: The Impact on Business Transfers and Collective Bargaining*, 65 MARQ. L. REV. 213, 223-39 (1981)(discussion of legal principles established by Supreme Court in successorship cases and how prospective purchasers can control obligation under successor doctrine when contemplating business transfer).

The *Burns* Court also reasoned that the goal of providing some protection to employees when a business transfer occurs would not necessarily be promoted. The employees may have made concessions in the contract with the predecessor employer that they would have never agreed to had the successor been the initial employer. *Burns*, 406 U.S. at 288; see *NLRB v. Armato*, 199 F.2d 800, 803 (7th Cir. 1952)(when business changes hands, employees may find different union better suits needs in new work environment).

⁴⁹ *Burns*, 406 U.S. at 288.

⁵⁰ 414 U.S. 168 (1973).

preme Court applied the successor doctrine in a manner different from both *Wiley* and *Burns*. The Court settled the question, which had previously been a source of conflict for the NLRB, of whether the successor could be required actually to remedy the unfair labor practices of the predecessor.⁵¹ The Court applied a tripartite balancing approach,⁵² and concluded that the successor could be required to remedy the unfair labor practices of a predecessor, but only if the successor had notice of the liability prior to the purchase.⁵³ Thus, the three United States Supreme Court decisions of *Wiley*, *Burns*, and *Golden State*, affirmed the imposition of successor liability in an employment envi-

⁵¹ *Id.* at 170. *Golden State*, a soft drink business, had discharged an employee because of union activities. The National Labor Relations Board ordered *Golden State* to reinstate the employee with back pay. *Id.* at 170-71. With knowledge of the outstanding order, All American Beverages purchased the *Golden State* business. *Id.* at 171.

⁵² *Id.* at 181. The three-fold approach employed by the Court sought to balance the interests of the employees, the successor, and that of national policy. The Court reasoned that when the assets of a predecessor are purchased and the operations continued in substantially the same manner, then the employing industry is essentially the same. *Id.* at 184. In such a situation, the Court reasoned that the employees view their jobs as unaltered, and any unremedied unfair labor practice of the predecessor would be considered by the employees as an affirmation and continuation of the labor violations. *Id.* Increased labor unrest—an effect in direct conflict with the national goal of labor peace—could result. *Id.* On the other hand, by imposing liability on the successor, the objectives of national labor policy could be strengthened with the successor sustaining only a minimal cost. *Id.* at 185. In forming these conclusions, the Court relied heavily on the principles expressed in *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967), *enforced sub nom.* *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968). In *Perma Vinyl*, the Board ruled that five employees had been discriminated against by *Perma Vinyl* and ordered that four employees be reinstated and “make-whole” damages be paid to all five. *Perma Vinyl*, 164 N.L.R.B. at 968. With knowledge of the order, U.S. Pipe purchased *Perma Vinyl*. *Id.* The NLRB reasoned that when one employer is substituted for another, the employing industry is essentially the same, and the effects of unfair labor practices will linger unless remedied. *Id.* at 969. The Board emphasized that “[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.” *Perma Vinyl*, 164 N.L.R.B. at 969 (quoting *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939)). As such, since the successor was in control of the business, the NLRB held that the successor could most effectively remedy the unfair labor practice. *Perma Vinyl*, 164 N.L.R.B. at 969. In the Board’s opinion, imposition of remedial orders on the successor would not pose an undue hardship since the successor had notice of the violations prior to the purchase. *Id.* The Board reasoned that the purchaser could shield against liability by altering the purchase price to reflect the potential liability or by including an indemnification clause in the agreement. *Id.*

⁵³ *Golden State*, 414 U.S. at 185. Without the notice requirement, the purchaser would be unable to protect himself from liability prior to the purchase. See *supra* note 52.

ronment.⁵⁴ As a result, the issue in subsequent cases focused on when the circumstances were appropriate to impose such liability.⁵⁵

In *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees International Union*,⁵⁶ the United States Supreme Court elaborated on the continuity factor established in *Wiley* as a prerequisite to liability.⁵⁷ The Court recognized that a determination of successorship does not ordinarily turn upon whether the business transfer was the result of a merger, consolidation, or purchase.⁵⁸ However, in the Court's opinion, such factors were relevant to the analysis in *Howard Johnson*.⁵⁹ The Court emphasized the proposition that, even if liability was not imposed on the successor, the union would still be able to enforce its claims against the predecessor, since the predecessor was a viable entity.⁶⁰ More importantly, the Court considered the requirement of continuity in the business enterprise, and determined that the criteria had not been satisfied in order to impose successorship.⁶¹ The Court analyzed continuity in terms of the work force⁶² and considered whether a majority of the predeces-

⁵⁴ See *supra* notes 41, 45, 53 and accompanying text.

⁵⁵ *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees Int'l Union*, 417 U.S. 249, 256 (1974).

⁵⁶ 417 U.S. 249 (1974). In *Howard Johnson*, the Grissoms owned a motor lodge and an adjacent restaurant. An agreement was reached whereby Howard Johnson would purchase all the personal property used in the operation of the restaurant and lodge, but the Grissoms would retain ownership of the real property and only lease its use to Howard Johnson. *Id.* at 251. Howard Johnson refused to recognize or bargain with the union for the 53 Grissoms' employees. Instead, Howard Johnson actively recruited employees through advertisements and posted notices. *Id.* at 252. When operations began, Howard Johnson had hired 45 employees, of which only nine were prior Grissoms' employees. The union filed suit under the Labor Management Relations Act, contending that Howard Johnson's refusal to hire all the Grissoms' employees was a "lockout" in violation of the collective bargaining agreement, and additionally that Howard Johnson was required as a successor to arbitrate. *Id.* at 252-53.

⁵⁷ *Id.* at 263.

⁵⁸ *Id.* at 257; see *Golden State*, 414 U.S. at 182-83 n.5 (continuity in employing industry used to determine successor responsibility rather than distinction based on merger, consolidation, or purchase). *But cf.* W. FLETCHER, *supra* note 32, at § 7121 (in case of merger, latter corporation liable for debts and contracts of former corporation), and *Id.* § 7122 (where one company sells or otherwise transfers assets to another company, latter company not liable for debts and liabilities of former company).

⁵⁹ *Howard Johnson*, 417 U.S. at 257.

⁶⁰ *Id.* In contrast, the Court noted that in *Wiley* the predecessor disappeared upon the merger and if the successor was not held liable then the employees would be left without a remedy. *Id.*

⁶¹ *Id.* at 264.

⁶² *But see id.* at 265 (Douglas, J., dissenting). Justice Douglas, questioning the logic

sor's employees had been hired by the successor.⁶³

The case of *EEOC v. MacMillan Bloedel Containers, Inc.*⁶⁴ presented the Sixth Circuit Court of Appeals with a successorship case

of this analysis, pointed out that essentially the only change in the business enterprise had been a replacement of some personnel. *Id.* at 267. By making the number of the predecessor's employees hired the determinative factor, the purchaser would be free to decide for himself whether to be bound as a successor. *Id.* at 268-69. In Justice Douglas' view, this undermined the purpose of the successor doctrine in an employment context by automatically terminating employees' rights with the business transfer. *Id.* at 267; see also *International Ass'n of Machinists, District Lodge 94 v. NLRB*, 414 F.2d 1135, 1138 (D.C. Cir. 1969)(held determination of successorship cannot turn on test of majority; "if the composition of the unit was the controlling factor in determining successorship, a purchaser might well seek to avoid application of the successorship principle by refusing to hire the seller's employees"). See generally, Note, *Obligations of Successor Employers: Recent Variations on the John Wiley Theme*, 2 Ga. L. Rev. 574, 582-86 (1968)(discussion of significance of employees to continuity).

⁶³ *Id.* at 263. The Court realized that the union in *Howard Johnson* sought arbitration not on behalf of the employees hired by Howard Johnson, but on behalf of those who were not hired. *Id.* at 260. The Court reiterated the rule that no law requires a purchaser to hire all the employees of the predecessor. *Id.* at 261; see *Burns*, 406 U.S. at 280 n.5 (although employer may assume obligation to hire all of predecessor's employees, successor not required to do so). On the other hand, lower courts ruled that a violation of the NLRA occurs where an employer refuses to hire employees solely for anti-union reasons. See, e.g., *Tri State Maintenance Corp. v. NLRB*, 408 F.2d 171, 174 (D.C. Cir. 1968)(refusal to hire employees because of union membership held violation of NLRA); *K.B. & J. Young's Super Mkts., Inc. v. NLRB*, 377 F.2d 463, 465 (9th Cir. 1967)(where employees not hired for anti-union reasons, reinstatement of such employees by successor appropriate). Numerous courts tested the continuity requirement with reference to the number of employees. See, e.g., *Tom-a-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1027 (7th Cir. 1969)(where 14 of successor's 24 employees previously employed by predecessor, continuity shown); *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833, 836 (9th Cir. 1964)(where only three of 12 employees previously employed by predecessor, continuity not satisfied); *Wackenhut Corp. v. International Union, United Plant Guard Workers of America*, 332 F.2d 954, 957-58 (9th Cir. 1964)(continuity shown where all or most of predecessor's 65 employees hired by successor). Other courts also examined continuity in terms of employees, but the opinions were sometimes unclear as to whether the decisions were based solely on that criterion. See, e.g., *Printing Specialties & Paper Prods. Union No. 447 v. Pride Papers Aaronson Bros. Paper Corp.*, 445 F.2d 361, 363-64 (2d Cir. 1971)(in addition to noting that none of predecessor's employees hired by successor, court mentioned that new business opened in new location); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284, 287 (5th Cir. 1954)(court noted that successor hired 50% of predecessor's employees, but also compared manufacturing process of predecessor and successor). One court took a contrary position and held that, based on the facts of the case, the number of employees was irrelevant to a determination of continuity. See *NLRB v. Armato*, 199 F.2d 800, 803 (7th Cir. 1952)(where only eight of predecessor's employees hired and 17 new employees added, number of employees irrelevant since unfair labor practices occurred prior to increase in employees).

⁶⁴ 503 F.2d 1086 (6th Cir. 1974).

in a new framework. This time plaintiff filed suit based not on the National Labor Relations Act, as had all the previously decided cases,⁶⁵ but on a Title VII⁶⁶ violation for race and sex discrimination.⁶⁷ The court reasoned that the objectives of both the NLRA and Title VII were essentially the same,⁶⁸ and therefore successor liability could be imposed in a Title VII action.⁶⁹ Furthermore, the same factors which had been considered in determining whether to impose liability in an action based on the NLRA should also apply in a Title VII action.⁷⁰ The court recognized that no exact formula could be expressed to determine when liability should be imposed and to what extent; but rather, the facts of each case would be controlling.⁷¹ Still, the court summarized all the factors considered relevant in previous decisions into one comprehensive list.⁷²

⁶⁵ See, e.g., *Wiley*, 376 U.S. at 549 (case decided on national labor policy considerations); *Golden State*, 414 U.S. at 171 (liability of "successor" defined by National Labor Relations Act).

⁶⁶ Title VII, as codified at 42 U.S.C. §§ 2000e-2000e-17 (1982), sets forth the regulations concerning equal employment opportunities.

⁶⁷ *MacMillan*, 503 F.2d at 1088. In 1969, Della Mercer filed a race and sex discrimination complaint with the Equal Employment Opportunities Commission (EEOC) against her employer, Flintkote Company. *Id.* The Flintkote plant was thereafter purchased by MacMillan Bloedel Containers, Inc. *Id.* On July 5, 1973, the EEOC sued MacMillan alleging continuation of Flintkote's discrimination practices. *Id.*

⁶⁸ *Id.* at 1091. The court noted that Title VII had, in fact, been modeled after the National Labor Relations Act. *Id.*; see *International Bd. of Elec. Workers, Local Union No. 5 v. EEOC*, 398 F.2d 248, 253 (1968) (regulations of EEOC based on NLRA).

⁶⁹ *MacMillan*, 503 F.2d at 1091. In the court's view, since Title VII was designed to eliminate discrimination, the application of the successorship doctrine in a Title VII action was essential. *Id.*

⁷⁰ *Id.* at 1090. The court considered all four of the leading NLRA decisions—*Wiley*, *Burns*, *Golden State*, and *Howard Johnson*—in establishing the guidelines for application of the successorship doctrine in a Title VII action. *MacMillan*, 503 F.2d at 1094.

⁷¹ *Id.* at 1092.

⁷² *Id.* at 1094. The court found nine factors to be relevant in a successorship action:

- (1) whether the successor company had notice of the charge,
- (2) the ability of the predecessor to provide relief,
- (3) whether there has been a substantial continuity of business operations,
- (4) whether the new employer uses the same plant,
- (5) whether he uses the same or substantially the same work force,
- (6) whether he uses the same or substantially the same supervisory personnel,
- (7) whether the same jobs exist under substantially the same working conditions,
- (8) whether he uses the same machinery, equipment and methods of production, and
- (9) whether he produces the same product.

Other courts followed the *MacMillan* factors when considering the application of the successor doctrine to Title VII cases.⁷³ With the application of the successor doctrine established in labor actions based on the NLRA and Title VII,⁷⁴ the next extension of the doctrine was to a section 1981 action for discrimination. In 1980, the United States District Court for the Northern District of Ohio addressed the question of whether the successor doctrine was applicable to a section 1981 action in *Howard v. Penn Central Transportation Co.*⁷⁵ The court noted that the application of the successor doctrine to a section 1981 action had never been decided by a court, although the doctrine had been adjudicated in Title VII actions.⁷⁶ The court reasoned that the purpose of both Title VII and section 1981 were to protect individuals from discrimination and to provide relief when violations occur.⁷⁷ Therefore, in order to promote the purpose of section 1981, the court ruled that the successor doctrine should be applied and further that the *MacMillan* standards should be used to determine successorship.⁷⁸

In the instant case, the court of appeals reasoned that since the employee's statutory rights should not have been impaired by a sudden

Id.

⁷³ Courts subsequently faced with Title VII cases followed the *MacMillan* factors and applied the doctrine of successor liability in some cases. *See, e.g.,* EEOC v. Sage Realty Corp., 507 F. Supp. 599, 612 (S.D.N.Y. 1981)(purchaser held liable as successor because all *MacMillan* factors, especially substantial continuity, satisfied); Escamilla v. Mosher Steel Co., 386 F. Supp. 101, 104-05 (S.D. Tex. 1975)(court denied motion to dismiss on grounds that it appeared plaintiff could prove he was entitled to relief within rules laid out by *MacMillan*). Other courts denied successor liability where the *MacMillan* tests were not met. *See, e.g.,* Burt v. Ramada Inn, 507 F. Supp. 336, 338 (N.D. Miss. 1980)(court questioned whether there had been substantial continuity, and noted that successor did not have notice of discrimination charges at time of purchase); Brown v. Evening News Ass'n, 473 F. Supp. 1242, 1247 (E.D. Mich. 1979)(successor's motion for summary judgment granted on basis that predecessor could provide relief to plaintiff).

⁷⁴ *See supra* notes 41, 53, 68 and accompanying text. For a general discussion of successor liability in NLRA and Title VII actions, see Barksdale, *Successor Liability Under the National Labor Relations Act and Title VII*, 54 TEX. L. REV. 707 (1976).

⁷⁵ 87 F.R.D. 342 (N.D. Ohio 1980). In *Penn Central*, a bankrupt railroad was conveyed to a solvent railroad company pursuant to statutory authority. *Id.* at 344. An employee of the predecessor railroad brought suit under Title VII and § 1981 against both the predecessor and successor railroads for alleged discriminatory acts of the predecessor railroad. *Penn Central*, 87 F.R.D. at 343.

⁷⁶ *Penn Central*, 87 F.R.D. at 346. The court considered the Title VII decision in *MacMillan*, as well as the NLRA decisions in *Wiley*, *Burns*, *Golden State*, and *Howard Johnson*, to assist in making a judgment as to whether the successor doctrine was appropriate for a § 1981 action. *Penn Central*, 87 F.R.D. at 346.

⁷⁷ *Penn Central*, 87 F.R.D. at 347.

⁷⁸ *Id.*

sale of the business, then a victim of discrimination who could have successfully asserted a claim against a predecessor should have been able to assert that claim against a successor.⁷⁹ The court further reasoned that since the victim of discrimination and the successor were both innocent parties, then the cost of discrimination should have been assumed by the party better able to bear the burden.⁸⁰ The court held that since a purchaser that acquires notice of an outstanding claim against a prospective company can protect itself from any potential liability,⁸¹ then imposition of liability on the innocent purchaser, rather than the victim, would be equitable.⁸² Furthermore, the court determined that since a certain degree of continuity must exist between the predecessor and successor, then the court could infer that the successor reasonably expected to be held responsible for any unsettled claims against the predecessor company.⁸³ Finally, the court concluded that since the purpose of the successor doctrine is to remedy the discriminatory acts of the predecessor,⁸⁴ then relief awarded in a section 1981 employment discrimination action should be limited to actual damages.⁸⁵

⁷⁹ *Musikiwamba*, 760 F.2d at 750. The court considered that Congress' main objective in enacting antidiscrimination laws was to eliminate unfair and arbitrary employment practices. *Id.* at 746. To promote this goal, the court concluded that a successor should be liable only when two conditions are met: first, the predecessor could have provided relief if the transfer had not taken place, and second, the predecessor had insufficient assets after the transfer with which to supply relief. *Id.* at 750-51, 755. The court stressed the importance of free transferability of capital and reorganization of failing businesses. *Id.* at 750-51. In the view of the court, these business practices would be adversely affected if a successor could be held liable when the predecessor could have provided no relief to the claimant had the transfer not occurred. *Id.* at 751.

⁸⁰ *Id.* at 747.

⁸¹ *Id.* at 750. The court recognized that when a purchaser has actual or constructive notice of a pending claim, the price can be negotiated so as to compensate for any potential liability, or an indemnification clause can be inserted in the sales agreement to provide protection. *Id.* at 750, 752, 755. The court thus ruled that absent sufficient notice, successor liability should not be imposed. *Id.* at 750, 755.

⁸² *Id.* at 750.

⁸³ *Id.* at 751. The court viewed continuity as a condition to be met to impose successor liability. *Id.* at 751, 755. However, the court recognized that this factor cannot be applied with uniformity, as each case must be decided in light of its own facts and by taking into consideration the number of employees affected and the types of relief sought. *Id.* at 751.

⁸⁴ *Id.* at 748-49.

⁸⁵ *Id.* at 749, 755. The court recognized that § 1981 could be applied in a multitude of actions, and that both punitive damages and compensatory damages would normally be appropriate. *Id.* at 748. However, since § 1981 was not enacted to deal solely with employment discrimination, the court looked to the NLRA and Title VII for guidance

Application of the successor doctrine in labor-related cases has been transformed from a very nebulous and inconsistent beginning⁸⁶ to a refined set of conditions⁸⁷ from which the courts can plug in the facts of a case and determine the most equitable solution to an inequitable situation.⁸⁸ This process supposedly "balances" the interests of the parties involved.⁸⁹ Although at first glance only two parties—i.e., the

since each was implemented specifically to regulate the work environment. *Id.* The court found both the NLRA and Title VII to be make-whole statutes in that an injured employee is prohibited from receiving punitive damages and compensatory damages. *Id.* Although the court rejected the defendant's argument that successor liability should be absolutely denied since § 1981 allows for punitive damages and compensatory damages, the court reasoned that successor liability should be limited to actual damages only. *Id.* at 749, 755. The court noted that punitive damages are designed to punish the violator and compensatory damages are imposed to provide relief for the collateral effects of discrimination. *Id.* at 749. As such, the court reasoned that the goals of deterring and eradicating employment discrimination would not be advanced by assessing these damages against a successor who was admittedly an innocent party and who may have never discriminated against an employee. *Id.*; cf. *id.* at 755 (Eschbach, J., concurring). Circuit Judge Eschbach noted that since the court's decision to allow the application of the successor doctrine in a § 1981 action was one of first impression, then the narrowness of the holding should be emphasized by reiterating the required conditions and the limitations on relief. *Id.* Summarizing the majority opinion, Judge Eschbach listed five conditions which the plaintiff must plead and prove in order to impose successor liability:

- (1) The predecessor must be liable to the plaintiff for employment discrimination under § 1981.
- (2) The successor must have had actual or constructive notice of the claim or charge of employment discrimination against the predecessor sufficiently in advance of the closing of the transaction to enable the successor to negotiate compensation for its exposure to the liability the plaintiff seeks to impose.
- (3) It must appear from the complaint that the predecessor is unable to provide the plaintiff with the relief he seeks from the successor.
- (4) But for the succession, the predecessor would have been able to provide the plaintiff with the relief he seeks from the successor.
- (5) There must be sufficient continuity between the business of the predecessor and the business of the successor to support the type of relief sought.

Id. Circuit Judge Eschbach also restated the court's holding that relief from a successor in a § 1981 action would be limited to make-whole damages, and that compensatory or punitive damages would not be allowed. *Id.*

⁸⁶ See *supra* notes 26-33 and accompanying text.

⁸⁷ See *supra* notes 72, 85 and accompanying text.

⁸⁸ The situation is inequitable because one party must bear the burden of the predecessor's discrimination. See *supra* text accompanying note 80. The court must choose whether that party will be the individual who has been discriminated against, or the successor who had no part in the discriminatory acts. See *supra* notes 81, 85 and accompanying text.

⁸⁹ See *supra* notes 39, 52 and accompanying text.

successor and the victim of discrimination—appear to be affected, the courts have recognized a third party.⁹⁰ This third party has consistently been the most influential of all. It is the public at large, represented by and protected by the goals of national policy.⁹¹ In the employment context, the goals of national policy demand that discrimination be eliminated,⁹² and, as such, the courts have ruled that it is the employing industry which is sought to be regulated.⁹³ In a case involving a successor corporation, we might therefore question whether the successor is really given fair consideration. However, whereas the employee has little power to protect himself,⁹⁴ the successor is protected in three ways. First, there must be substantial continuity between the predecessor's business and that of the successor before liability can be imposed on the successor.⁹⁵ Second, the predecessor must not be able to provide relief after the transfer to the successor, but would have been able to do so if the transfer had not occurred.⁹⁶ Finally, and most importantly, prior to the purchase the successor must have had notice, either actual or constructive, of the predecessor's violations in order to hold the successor liable.⁹⁷ With these three shields available to the successor, it seems totally just to hold the successor liable since the successor has ample opportunity to protect itself.⁹⁸ As such, the courts have ruled, and the United States Supreme Court has upheld, that the successor doctrine is appropriate for employment discrimination actions based on the NLRA and Title VII.⁹⁹ The Seventh Circuit Court of Appeals in *Musikiwamba* has extended the application of the successor doctrine to employment discrimination cases founded on section 1981.¹⁰⁰ Based on the rationale expressed by the courts in prior NLRA and Title VII cases,¹⁰¹ and considering the purposes of section 1981 in an employment discrimination action,¹⁰² it seems most certain that, if ever faced with the question, the United

⁹⁰ See *supra* note 52 and accompanying text.

⁹¹ *Id.*

⁹² See *supra* notes 69, 77, 79 and accompanying text.

⁹³ See *supra* note 52 and accompanying text.

⁹⁴ See *supra* note 39 and accompanying text.

⁹⁵ See *supra* notes 40, 72, 83, 85 and accompanying text.

⁹⁶ See *supra* notes 72, 79, 85 and accompanying text.

⁹⁷ See *supra* notes 52, 72, 81, 85 and accompanying text.

⁹⁸ See *supra* notes 52, 81 and accompanying text.

⁹⁹ See *supra* notes 41, 45, 53, 69 and accompanying text.

¹⁰⁰ *Musikiwamba*, 760 F.2d at 750.

¹⁰¹ See *supra* notes 37-40, 52, 68-69 and accompanying text.

¹⁰² See *supra* note 79 and accompanying text.

States Supreme Court would affirm the application of the successor doctrine in a section 1981 action.

Brenda Kay Tanner

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